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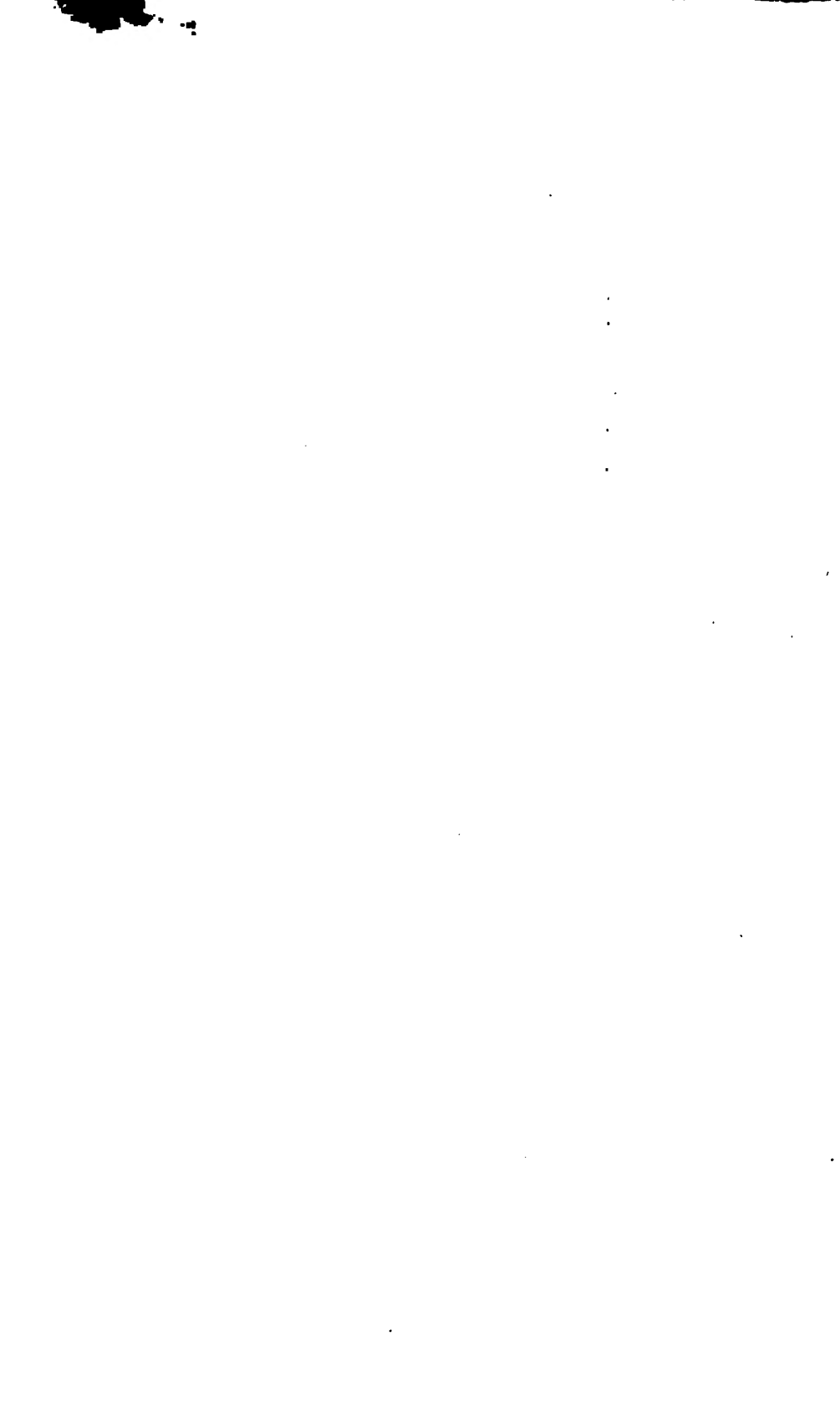
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

**WITH TABLES OF THE NAMES OF THE CASES ARGUED
AND CITED, AND THE PRINCIPAL MATTERS.**

BY
JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,
AND
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,
ESQRS. BARRISTERS AT LAW.

VOL. V.
CONTAINING THE CASES OF TRINITY AND MICHAELMAS TERMS,
IN THE SEVENTH YEAR OF WILLIAM IV. 1836.

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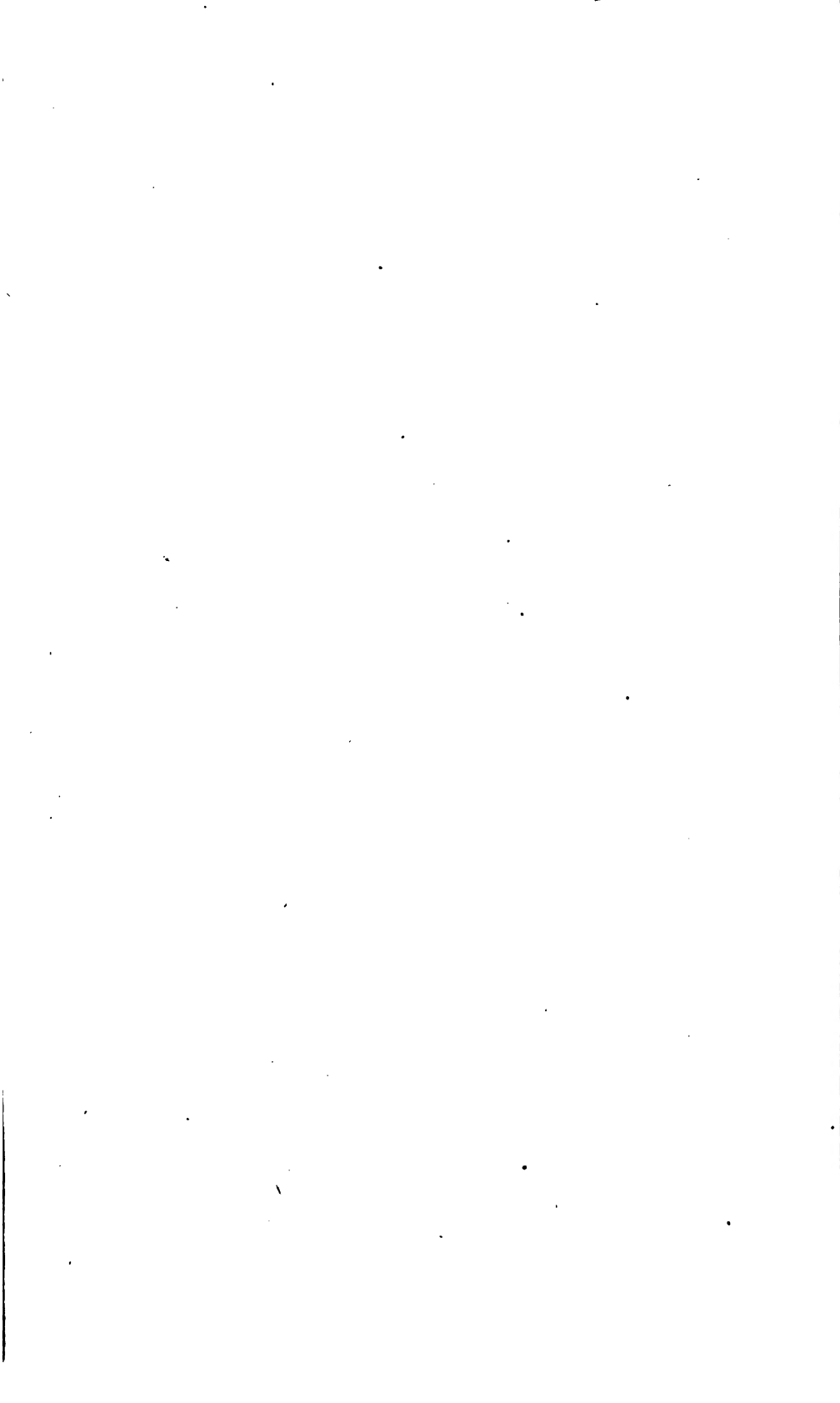
JUN 25 1901

J U D G E S
OF
THE COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.



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ERRATA.

Page 331. at bottom, for "st. 59 G. 3. c. 139." read "st. 56 G. 3. c. 139."

Page 219. Rule of Court, last line but one, for "2 W. 4. II." read "4 W. 4. II."

C A S E S

ARGUED AND DETERMINED

1836.

IN THE

Court of KING's BENCH,

AND

ON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Sixth Year of the Reign of WILLIAM IV.

(Continued from Vol. IV.)

The Governor, Deputy Governor, Assistants, *Monday,*
and Guardians of the Poor of the City of *May 9th.*
BRISTOL *against* WAIT, GARDNER, and
BARNETT.

REPLEVIN. The defendants avowed, as overseers of the poor of the parish of *St. Philip* and *St. Jacob*, in *Gloucestershire*, for distresses under justices' warrants, for poor rates stated to be made on the plaintiffs as occupiers of certain premises in that parish, for which they were rateable to the poor. There were *Governors of the poor, hiring a house without their district for the purpose of setting their own paupers to work there, and using it for that purpose only, are rate-*
able in the parish in which the house is, as occupiers, whether the employment of the paupers there be profitable or not.

VOL. V.

B

several

1836.

—
Governors of
the Bristol
Poor
against
Warr.

several avowries for different rates; and one of the avowries set forth part of a statute (1 W. 4. c. iv., local and personal, public), whereby it was enacted that the plaintiffs might contract for the purchase of certain premises for an asylum for pauper lunatics, and that the same, when so purchased and appropriated, should be subject and liable to such rates as they were then subject and liable to, but should not be assessed to any rates at a higher rate or value than that at which they were at the time of such purchase rated or assessed; that the plaintiffs did purchase and appropriate the premises, and became and were, and from thence hitherto had been, and still were, the occupiers of the same; that the premises were, before the act, liable to rates; and that the plaintiffs were also occupiers of other premises in the parish: allegation, that certain rates were made on the plaintiffs in respect of their occupation, which, so far as related to the premises purchased under the statute, were not higher than the same were rated at before the purchase: allegation of warrant of distress, &c. Pleas, to each avowry, *de injuriâ* (a). Issue thereon.

On the trial before *Alderson* B., at the *Gloucestershire* Summer assizes 1834, the facts (as stated by the Lord Chief Justice in delivering judgment) appeared to be these: —

The plaintiffs, being governors of the poor of the city of *Bristol*, had taken certain property, out of the limits of the city, and within the parish of *St. Philip* and *St. Jacob*, for the purpose of putting out their poor, either simply to lodge them, or to employ them at their

(a) There were other pleas on each avowry, which led to issues in law, all of which were decided in favour of the defendants; see *The Governor &c. of the Bristol Poor v. Warr*, 1 A. & E. 264.

discretion.

discretion. It further appeared that, in some part of the property (houses and buildings), the poor had been employed in a manufacture, which was stated to have been a losing concern, and, in other parts, had been merely lodged. It further appeared that such property would have been rateable towards the relief of the poor of *St. Philip* and *St. Jacob*, unless the kind of occupation in this particular case exempted it.

The counsel for the plaintiffs contended that, this property being rated in each rate, all the rates were bad, inasmuch as, under these circumstances, the defendants were not such occupiers of it as to be rateable to the poor (a). The learned Judge directed a verdict

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(a) Several other points were discussed, both at *Nisi Prius* and in *Banc*. Among these were, whether the objection to the rates could be taken otherwise than by appeal; whether the rates were formally made, and consistent with the distress warrant; and whether the overseers were properly appointed. Also, it appeared that, until the purchase under the local act, part of the premises had been in the occupation of officers of the ordnance, for the service of the Crown; and it was contended that these premises were therefore not rateable at the time of the purchase, and consequently, under the terms of the local act, not afterwards. The parties, on learning the opinion of the Court as to the point mentioned in the text, came to a compromise on the other points. Besides the authorities mentioned above, the following were cited. *Marshall v. Pitman*, 9 *Bing* 595.; the previous case between the present parties, 1 *A. & E.* 264.; *Stat.* 38 *G. 3. c. 69.* (local and personal, public); *Rez v. Stubbs*, 2 *T. R.* 395., and note (a) at p. 396.; *Weaver v. Price*, 3 *B. & Ad.* 409.; 1 *Nol. P. L.* 54, 59. (ed. 4th); *Nichols v. Carter*, *Cro. Car.* 394.; *Groenvelt v. Burwell*, 1 *Ld. Raym.* 454.; *Milward v. Coffin*, 2 *W. Bl.* 1390.; *Durrant v. Boys*, 6 *T. R.* 580.; *Hutchins v. Chambers*, 1 *Burr.* 579.; *Rez v. Sutton*, 4 *M. & S.* 582.; *Stat.* 17 *G. 2. c. 33. ss. 4, 7.*; *Rez v. The Hull Dock Company*, 3 *B. & C.* 516.; *Rez v. Newbury*, 4 *T. R.* 475.; forms in *Burn's Justice, Poor*, (see ed. *D'Oyl. & Wil.* vol. iv. p. 223, forms (A), (C), (E)); *Rez v. Benn*, 6 *T. R.* 198.; *Fawcett v. Fowles*, 7 *B. & C.* 394.; *Bonnell v. Bighton*, 5 *T. R.* 182.; *Rez v. Morgan*, 2 *A. & E.* 618. note (a) (*S. C.*, as *Rez v. The Justices of Buckinghamshire*, 3 *N. & M.* 68.); *Rez v. Trecothick*, 2 *A. & E.* 405.; *Rez v. Greame*, 2 *A. & E.* 615.

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for the plaintiffs, reserving leave to move to enter a verdict for the defendants. In *Michaelmas* term 1834, *Ludlow* Serjt. obtained a rule accordingly.

Maule and *W. J. Alexander* shewed cause in *Hilary* term last (a). The plaintiffs have no beneficial occupation. The premises are occupied for the purposes of charity. It has been held, that a party is not an "inhabitant" or "occupier," under stat. 43 *Eliz.* c. 2. s. 1., who occupies solely for public purposes. It cannot be said that the plaintiffs inhabit here: the claim upon them must, therefore, be simply by virtue of their occupation. If the owner of lands choose to leave them quite barren and unoccupied, he cannot be rated for them; per Lord *Mansfield*, in *Rex v. Occupiers of St. Luke's Hospital* (b). In *Lord Amherst v. Lord Sommers* (c) the colonel of a cavalry regiment had hired stables for the use solely of the regiment, under a warrant from the Crown; and it was held that he was not rateable in respect of them. In *Rex v. Occupiers of St. Luke's Hospital* (d) it was held that no one was rateable in respect of a lunatic hospital. In *Holford v. Copeland* (e) it was held that the masters in chancery are not rateable for their chambers in *Southampton Buildings*, under an act (11 G. 3. c. 22. ss. 24, 38.) giving power to rate persons "who do or shall inhabit hold, use, occupy, possess, or enjoy" lands, houses, &c., and that "schools, inns of court and chancery, halls, societies," "and all other public build-

(a) The case was argued on *January* 19th and 20th, before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(b) 2 *Burr.* 1064.

(c) 2 *T. R.* 372.

(d) 2 *Burr.* 1053. See *Rex v. St. Giles, York*, 3 *B. & Ad.* 573.

(e) 3 *B. & P.* 129.

ings" shall be rated, and the rate "be paid by the owner or owners, proprietor or proprietors." In *Rex v. Terrott* (a) it was held that an officer, who, by himself and his family, occupied apartments in barracks, not necessary to him for the purpose of the public service, was rateable in respect of such occupation. In that case all the authorities were collected; and the principles laid down in the judgment shew that the plaintiffs here have not such an occupation as makes them rateable. It is there said (p. 514) that, "if the party rated have the use of the building or other subject of the rate as a mere servant of the crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it in any personal and private respect, then he is not rateable."

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Ludlow Serjt., Sir *W. W. Follett*, *Maclean*, and *Greaves*, contra. It is true that public property has been held not rateable: but the decisions on this point have been founded upon the impossibility of finding an occupier. That is, in effect, the explanation given by Lord *Kenyon* in *Rex v. Hurd* (b); and it is the principle upon which *Lord Amherst v. Lord Sommers* (c) was decided. [Lord *Denman* C. J. referred to *Ayr v. Smallpeace* (d).] This, however, is not only an occupation, but a beneficial one. The plaintiffs relieve themselves of the expense of supporting their own paupers by making them work in another parish. An occupation by putting in paupers is not an occupation for a public purpose. as sometimes happens, all the rateable property in

(a) 3 *East*, 506.(b) 3 *T. R.* 497.(c) 2 *T. R.* 372(d) 1 *Bott*, 125, pl. 154. (ed. 6th.)

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or not. It is not to be denied but that this phrase, "beneficial occupation," has been in frequent use; and, generally speaking, it serves tolerably well to convey rather a popular notion, than to give a certain rule for deciding the question of rateability in every instance. Because, if by beneficial be meant *profitable*, or any thing like it, the expression is obviously fallacious: and upon this point all discussion is superfluous, because the case of an unprofitable and losing occupation (expressly so found) of a coal-mine, has been held no exemption from rateability (a), a coal mine, by the words of stat. 43 *Eliz. c. 2. s. 1.*, being subject to a rate. Without affecting the precision of an exact definition, it would probably be nearer the truth to say, that the *presumptive* liability arising from occupation is to be explained away in each case. Why is the coachman living in apartments, by permission of his master, not rateable, according to Lord *Kenyon*, in the case of *Rex v. Field* (b)? It is his master's occupation. Why were not the matron and the superintendent, in the cases above referred to, rateable for the apartments they occupied? Because, as they had no more than was necessary to carry into effect the object of the establishment, in each instance, to rate them would, in reality, be to rate the charity children in the one case, and the lunatics in the other. It cannot be said that *no benefit* is derived. By the occupation of the portion of the building in each of the cases alluded to, the expense of a house, or lodging, elsewhere, is saved.

But, moreover, the question here does not arise upon a rate imposed by the managers of the poor of *Bristol*

(a) *Rex v. Parrot*, 5 T. R. 593.

(b) 5 T. R. 592.

upon premises occupied by their own poor, within their own city. On the contrary, the rate in question was imposed by foreign overseers upon property situated in their own parish, and which, in the hands of an ordinary individual, would clearly be rateable to the relief of their poor. How does it concern the overseers and ley payers of the parish of *St. Philip* and *St. Jacob*, in what manner any person or persons manage the property taken and held in that parish? Suppose the governors of *Bristol* to have taken 100 acres of land only, and to have brought such of their paupers as were capable of labour from a poor-house in *Bristol*, to employ them upon the land, as a beneficial mode, according to their opinion, of disposing of the 'poor. Suppose, also, that the return, whatever it might be, was applied solely towards the maintenance of the poor who had laboured upon the farm, or of those who were unfit for labour, and had been left behind: how can this constitute a better claim to exemption from rateability in the parish where the property lies than a *losing* occupation, which, it is quite certain, does not affect the question of liability at all? The same rule must, of course, apply to every species of property.

We are, therefore, upon the whole, of opinion that the buildings so held by the Plaintiffs in the parish of *St. Philip* and *St. Jacob* were rateable to the relief of the poor of that parish; and that a verdict, according to the leave reserved, should be entered for the Defendants.

Verdict to be entered for the Defendants.

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Under statute 59 G. 3. c. 134. s. 14., churchwardens cannot raise a loan on the credit of the church-rates to pay a debt for repairs, incurred in a past year,

The loan ought to be raised at the time when the repairs are done, and the laying of rates for the repayment should commence immediately, and be continued so as to pay off the debt by ten annual instalments.

IN *Michaelmas* term 1835, *R. V. Richards* obtained a rule nisi for a mandamus to the churchwardens of *Dursley, Gloucestershire*, to pay *Charles Bruce Warner*, Esquire, the instalments which had become due and were unpaid, of the sum of 350*l.* borrowed under the provisions of stat. 59 G. 3. c. 134, and of the subsequent acts in furtherance of the same object, and the arrear of interest due on 300*l.*, part of the said sum; or to raise by rate, pursuant to the said statute, a sum sufficient for that purpose, and pay the same to the said *C. B. Warner*. The affidavits in support of the rule contained the following statements: —

In 1832, Mr. *Warner* was applied to by *Bloxsome* and *Hickes*, the then churchwardens, to lend them 350*l.* towards defraying the expense of repairing the parish church; the money to be borrowed and raised on the credit of the church rates according to the above statute; and he lent the sum, having first ascertained that the proper consents would be given. *Bloxsome* and *Hickes* gave him a deed of charge, dated *February* 27th 1832, the recitals of which he believed to be true. It recited that the vestrymen of *Dursley*, deeming it necessary, in the years 1824, 5, 6, that certain repairs should be done to the church, they were effected at the expense of 1585*l.*: that, in *November* 1831, there being 413*l.* of that sum unpaid, a vestry was held, at which it was unanimously resolved that 63*l.* should be raised

raised and paid in part of that sum, and that 350*l.* should be borrowed and raised on the credit of the church rates, under stat. 59 G. 3. c. 134; and the churchwardens were directed to apply to the bishop and incumbent for their consents: and that the consents were afterwards given, and the money lent by *Warner* on condition that it should be repaid by annual instalments of 50*l.* on the 27th of *February*, and five per cent. interest be paid half-yearly on *August* 27th, and *February* 27th. *Blossome* and *Hickes* did then, by that deed, as churchwardens, charge the parish of *Dursley* with the said 350*l.*, and with the repayment thereof, with interest, according to the above terms; and did thereby, in pursuance of the above act, and of any other act or acts &c., declare, "that the said sum of 350*l.*, with interest thereon, is, and shall continue to be, chargeable and charged upon the church rates now raised or hereafter to be raised in the said parish, until the said sum of 350*l.*, together with the interest, is fully repaid according to the terms and conditions above set forth." Nine of the parishioners (among whom were the two churchwardens,) also gave a bond as a collateral security, and thereby severally bound themselves to make good each a ninth part of the 350*l.*, if not paid out of the rates, or of such parts of it as should not be paid. The instalment of 1833 was paid, and interest down to *August* 1834; but no further payment was made, though the churchwardens were applied to at various times down to *July* 1835.

In opposition to the rule, *Bishop*, one of the churchwardens for the current year, deposed that many of the rate-payers had determined to resist payment of any rate made for paying off the sums claimed by *Warner*,
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alleging that the churchwardens of 1832 had no right to raise money in that year for discharging a debt incurred by new pewing, ornamenting, and beautifying the church in 1824 and 1825, before they became holders of property in the parish; and likewise that the expense was objectionable as not having been incurred for necessary repairs. *Bishop* stated that the parish had no funds in hand; and that the debt was incurred long before he himself was a resident in the parish. In *February* 1833 and *February* 1834, *Bloxsome* and *Hickes* were still churchwardens: *Bishop* and one *West* were sworn in churchwardens in *May* 1834.

Thesiger and *Busby* shewed cause in Easter term, 1836 (a). Any point that might arise from the change of churchwardens since 1832 is waived for the purpose of this argument. By stat. 59 G. 3. c. 134. s. 14., it is enacted, that it shall be lawful for the churchwardens of any parish, with the consent of the vestry, and of the Bishop and incumbent, "to borrow and raise upon the credit of the church rates, or of any rates made under the said recited act or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or chapels; and they are hereby empowered and required, in any case in which such money shall have been borrowed, to raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall be repaid." The question here is, whether church-

(a) *April* 23d. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

wardens,

wardens, having ordered repairs, and that without ascertaining the cost at the time, may borrow money on the credit of the rates, to pay for such repairs, six years after they have been done? The effect of that proceeding is to make persons liable for the expense, who were not inhabitants when it was incurred. The words of stat. 59 G. 3. c. 134. s. 14. are prospective, enabling the churchwardens to borrow such monies as "shall be necessary" for defraying the expense of repairs. The proper course is, that they should first ascertain the amount which will be necessary, then borrow the money. It is to secure the proper performance of this, that the statute requires the consent of the bishop and incumbent to the borrowing: when that has been properly done, the rate may be imposed and levied without any further consent. This view of the statute is consistent with the decision in *Rex v. The Churchwardens of St. Mary, Lambeth (a)*, on stat. 58 G. 3. c. 45. [Coleridge J. It may be very necessary to ascertain the amount which will be wanted, in order to obtain the requisite consents]. Besides, it is a rule that a mandamus does not lie where parties have another remedy; the only exception is, where that remedy would not be equally efficacious, *Rex v. The Severn and Wye Railway Company (b)*. Here the remedy upon the bond given as a collateral security would be as effectual as the proceeding by mandamus. [Coleridge J. It is not a remedy available against the rates.] After the objection made by many of the inhabitants, the churchwardens, if they complied with such a mandamus as is here suggested, might reasonably fear that they would be liable to an action; and therefore the mandamus ought not to go; *Rex v. Dyer (c)*.

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(a) 3 B. & Ad. 651. (b) 2 B. & Ad. 646. (c) 2 A. & E. 606.

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R. V. Richards, contra. The bond gives no remedy except in the event of the rates failing. The fear of an action is no answer to such an application as this, unless the Court see that it is a well-grounded fear. The real question is, whether the inhabitants may be bound by a deed of charge for a loan raised to pay for repairs appearing by such deed to have been done in a past year. Inconveniences may be suggested, whether the mandamus be held to lie or not. But the object of stat. 59 G. 3. c. 134. (which, for the present purpose, operates in extension of stat. 58 G. 3. c. 45.) is to make the parish a quasi corporation with reference to debts of this kind. By the later act the consents of the bishop and incumbent are required, in addition to that of the vestry, for borrowing money on the credit of the church rates for the purpose of repairs. If the consenting parties, in their discretion, allow the loan, as requisite for the purpose of repairs, the rate may be made to meet such loan; and it cannot be maintained that the lender is bound at his peril to see that the rates are from time to time properly appropriated. The fourteenth section of the latter statute is very strongly expressed; the words "such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or chapels" may refer either to bygone or to future expenses. At least the application is so far reasonable, that a mandamus ought to go, in order that the point may be discussed on the return. No case appears to touch upon the subject, except *Rex v. The Churchwardens of St. Mary, Lambeth* (a), which, as far as it applies, is in favour of this rule.

Cur. adv. vult.

(a) 3 B. & Ad. 651.

Lord

Lord DENMAN C. J. in the same term, *May* 6th, delivered the judgment of the Court.

After stating the nature of the application, his Lordship said: It appeared, among other facts, that the repairs in question had been done in the years 1824, 1825, and 1826, at an expense of 1585*l.*; that in 1832, the sum of 350*l.* remaining unpaid, the applicant had been asked to lend that sum, and had done so, receiving a deed of charge, regular in form, and with the necessary consent of the bishop, incumbent, and vestry. One instalment of the principal and interest had been paid in 1833, and the interest to *August* 1834.

It was objected, on shewing cause, that the section in question (59 G. 3. c. 134. s. 14.) does not authorise the borrowing money and charging the rates retrospectively. We have considered this objection; and, although the words of the statute are in this respect general, we are of opinion that it must prevail.

It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just, or more likely to conduce to economy, than to hold that they who create a charge shall themselves bear it. The statute has, to a certain extent, modified this general rule; and the churchwardens are authorised, with the sanction of the vestry, bishop, and incumbent, to borrow, on the credit of the rates, such sum of money as shall be necessary for defraying the expense of repairing the church: and they are then empowered *and required* to raise, by rate, a sum sufficient from time to time to pay the interest, and not less than

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than 10 per cent. of the principal, until the whole of the money so borrowed shall be repaid.

It appears to us that all these provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appear to have been thought necessary, in order to see that the repairs should be of that onerous and yet permanent nature which might properly be thrown in part on the payers of succeeding years. Their consent, and that of the vestry, have the effect also of securing the parish from an improvident outlay: and, finally, the provision that the principal and interest shall be paid in ten instalments, which ought in our opinion to be annual, secures the participation of the existing rate-payers in the discharge of the loan, and prevents it from becoming a burthen at any indefinite period on their successors.

These obvious purposes of the act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are therefore of opinion that the rate now sought to be imposed would not be authorised by the statute, and of course that the present rule must be discharged.

Rule discharged.

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The KING *against* The Principal and Antients
of BARNARD'S INN.

A RULE was obtained in *Trinity* term 1835, calling upon the Principal and Antients of the Society of *Barnard's Inn* in the city of *London* to shew cause why a mandamus should not issue, commanding them to admit *William Gresham*, gentleman, a member of that society.

Rule for a mandamus to the Principal and Antients of *Barnard's Inn* to admit an attorney into the society, discharged, it not appearing that this Court had the requisite authority over the Inn.

The affidavit of Mr. *Gresham*, on which the rule was obtained, stated that he was an attorney of this Court, and of the Court of Common Pleas, and a solicitor in Chancery, and had been some years resident in *Barnard's Inn*. That, "by an order made in the reign of the late Queen *Elizabeth*, entitled, Orders necessary for the government of the Inns of Court, established by commandment of the Queen's Majesty, with the advice of her Privy Council, and the Justices of her Bench, and the Common Pleas, in *Easter* term, in the sixteenth year of the reign of the said Queen, the reformation and order for the Inns of Chancery is referred to the consideration of the Benchers of the Houses of Court, whereto they are belonging; wherein they are to use the advice and assistance of the Justices of the Courts at *Westminster*, and thereof to make a certificate to the Privy Council at the second sitting the next term in the Star Chamber; and which said order is signed by the then members of the Privy Council" (a). That in 36 & 38 *Eliz.* and 12 *Ja.* 1. (b),

(a) *Dugd. Orig.* 312. 3d ed.

(b) See *Dugd. Orig.* 313, 314, 316, 317. 3d ed.

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orders were made by the Crown with the advice and assistance of the Privy Council and all the Judges, for the regulation and ordering of the said Inns of Court and Chancery; and that particularly, "by an order (a) made" 12 *Ja.* 1., "reciting, For that there may be great abuse in the lodging and harbouring of ill subjects, or dangerous persons in the said Inns of Court and Chancery, being privileged and exempted places: it is therefore ordered, that there be general searches in every house of Court and Chancery twice every *Michaelmas* term."

And that, "by an order made" 15th *April*, 6 *Car.* 1. (b), "by the Lord Keeper of the Great Seal of *England*, and all the Judges of both Benches, and Barons of the Exchequer, by command of the King's Majesty's most honourable Privy Council, for the government of the Inns of Court and Chancery, it is ordered that the Inns of Chancery shall hold their government subordinate to the Benchers of the Inns of Court unto which they belong: and in case any attorney, clerk, or officer of any Court of Justice, being of any of the Inns of Chancery, shall withstand the direction given by the Benchers of Court, upon complaint thereof to the Judges of the Court in which he shall serve, he shall be severely punished; either by forejudging from the Court, or otherwise, as the case shall deserve." And it is further ordered, "that the Benchers of every Inn of Court cause the Inns of Chancery to be surveyed; that there may be a competent number of chambers for students; and that once a year an exact survey be taken, that the chambers allotted for that purpose be accordingly employed."

(a) *Dugd. Orig.* 317. 3d ed.(d) *Dugd. Orig.* 320. 3d ed.

It was further stated, that *John Baines*, principal of *Barnard's Inn*, and a clerk in the Six Clerks' Office, in *Hilary* term 1828, in a cause in this Court between one *Baker*, plaintiff, and the said *John Baines*, defendant (a), "did, as defendant in the said cause, allege and plead that *Barnard's Inn* was inhabited by a society known by the name of the Society of *Barnard's Inn*, theretofore lawfully constituted as one of the Inns of Court of Chancery, and had from time immemorial had certain rights and privileges which he, the said *John Baines*, then claimed on behalf of such society."

Also that, "by several orders of this Court, and particularly by certain rules of Court made in *Michaelmas* term 1654, and *Michaelmas* term 1704 (b), it was ordered

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(a) *Baker v. Baines*. See 5 B. & C. 24. note (a).

(b) Rules and Orders of The Court of King's Bench, pp. 19, 97. ed. by *Peacock*, 1811. The rule of *Mich.* 1654 is, "That all officers and attorneys of this Court be admitted of some Inn of Court or Chancery, by the beginning of *Hilary* term next, or in the same term wherein they shall be admitted officers or attorneys, and be in Commons one week in every term, and take chambers there; or in case that cannot be conveniently done, yet to take chambers or dwellings in some convenient places, and leave notice with the butler where their chambers or habitations are, under pain of being put out of the roll of attorneys." The rule of 1704 has the following preamble: — "Whereas divers complaints have been made to us, that many attorneys and clerks of the several Courts at *Westminster* are not admitted in any of the Inns of Court or Chancery, according to ancient course and usage, by which they might be resorted to, and business of law better managed, to the greater ease of the Queen's subjects; the neglect whereof is to the great detriment and decay of the societies of the law, and divers inconveniencies do thereupon daily happen; for prevention whereof, and to establish a remedy for the same, It is ordered," that all attorneys, &c., shall procure themselves to be admitted, &c. (as in the text, p. 20.) "before the end of *Trinity* term now next ensuing, and take chambers there (if conveniently they may be had), else that they take lodgings in some convenient place near the said Inns, and leave notice in writing with the butler or porter of such Inn whereof they are admitted, where their lodgings or habitations are,

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ordered by the Judges of the several courts of Queen's Bench and Common Pleas, and the Barons of the Exchequer at *Westminster*, That all attorneys and clerks of the said courts, not already admitted into one of the Inns of Court or Chancery, shall procure themselves to be admitted into one of the said Inns of Court (if those honourable societies will admit them), or into one of the Inns of Chancery." And that the deponent was informed and believed that, "by the recent orders of some or all of the Inns of Court, an attorney or solicitor, while he is on the Rolls of any of the Courts at *Westminster*, is not admissible of such Inns of Court; but such orders do not extend to the Inns of Chancery."

It was then stated that, on *March* 19th 1832, Mr. *Gresham* wrote to Mr. *Baines* the principal, expressing his desire to become a member, and offering to give the customary bond, and in other respects conform to the regulations of the society. The society refused compliance. In *August* 1832, Mr. *Gresham*, being then resident in the Inn, renewed the application, presenting testimonials of his fitness. Compliance was refused. In *January* 1834, he again applied, requiring that, in the event of non-compliance, the society would certify the refusal, and the grounds of it, in order that he might appeal to the visitors of the Inn or proceed otherwise,

except such persons as are, or shall be hereafter, inhabitants or house-keepers in *London*, *Westminster*, *Southwark*, or the suburbs thereof, and liberty of the tower of *London*, and *St. Catharine's* there, and such who are sworn attorneys of Courts within the said cities, towns and liberties."

See also the Rules (and introductory recitals) C. B. *Mich.* 29 *Car.* 2., and *Mich.* 36 *Car.* 2., Rules and Orders of the Court of Common Pleas, ed. by *Peacock*, pp. 53. 69.

And the Rule, *Hil.* 8 *G.* 3. K. B.; Rules and Orders of K. B., ed. by *Short*, 1822, p. 23.: 1 *Tidd*, 72. 9th ed.

as advised. Admission was not granted, nor any statement furnished. The principal and secretary informed Mr. *Gresham* that there was no objection to his character or fitness; but (according to *Gresham's* affidavit) Mr. *Baines*, the principal, stated to him that the society was full, and no other members could be admitted.

The affidavit went into further statements as to the admission of another person subsequently to *Gresham's* application; the funds of the society, and the disposal of them; the persons who were members, and the manner in which the chambers were occupied. And it then stated, that Mr. *Gresham*, conceiving that the society of *Gray's Inn* might, as visitors of *Barnard's Inn*, exercise their visitatorial power as to his admission, lately presented to the members of the Bench of *Gray's Inn* a memorial, praying that they would undertake such enquiry as should seem meet, or would take such other steps as should seem best calculated to promote the ends of justice, so that deponent might be admitted a member of *Barnard's Inn*. The Benchers of *Gray's Inn* appointed a day for hearing, and caused a copy of the memorial to be served on the Principal and Antients of *Barnard's Inn*. No one attended on their behalf. Mr. *Gresham* was heard, and the Benchers afterwards informed him, by their treasurer, that they had "caused search to be made for precedents, but none had been found which, in the opinion of the said Benchers, sufficiently bore upon the case of deponent; and that, in consideration of all the circumstances, they, the said Benchers, declined interfering in the matter of the said memorial."

The affidavit finally stated that the said *John Baines* now was and acted as principal of *Barnard's Inn*, and that

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certain other persons named were antients: and that, unless this Court would interfere, the deponent had no means of procuring the observance of the said rules of Court by the society, nor any mode of obtaining admission.

In opposition to the rule, affidavits were put in, sworn by the present principal, Mr. *Baines*, and the late principal, stating: "That the said society" (of *Barnard's Inn*) "is a voluntary society, and has, as deponents believe, existed for several centuries." That the said society is composed of a principal, antients, and companions; and that the number of such antients and companions has from time to time varied according to the will and discretion of the said principal and antients. That the principal and antients of the said society, or the majority thereof, have alone the conduct, management, and control thereof, and alone make, and have, as the deponents believe, since the existence of the same made, all the rules, orders, and regulations relating to the said society, the election of the antients and companions or members, and all other matters connected therewith. "That no person is nor ever has, as deponents believe, been admitted a member or companion of the said society, without having been first proposed by an antient, and seconded by another antient, and elected by the majority of the said antients. And these deponents have never heard, nor do they believe, that any person or persons has or have been elected a member of the said society in any other manner." And they added that *Gresham* never had been so proposed, seconded, or elected. That the property of the society (with a trifling exception) consists of premises, holden under a lease for forty years, granted by the dean and chapter of *Lincoln* to the principal for the time being,

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in trust for himself and the antients, such lease being renewable every fourteen years on payment of a fine varying from time to time in amount; and which fine had, sometimes, when the society's funds were insufficient, been provided for by loans from the antients' private funds. That it was at this time necessary to renew the lease: that (from circumstances which were stated) it was doubtful whether the lease would be renewed, and that, if it were, there were not sufficient funds of the society to pay the fine. Mr. *Baines* denied having stated to Mr. *Gresham* that the society was full.

Another affidavit was put in, in opposition to the rule, stating that *William Gresham*, who was believed to be the party now applying, was admitted a member of *Gray's Inn* on the 26th of *January* 1835, and was still a member (a).

Sir *W. W. Follett* shewed cause in the present term (b). There is no instance of an application like this, except *Rex v. The Benchers of Gray's Inn* (c), and *Rex v. The Benchers of Lincoln's Inn* (d). In the first of those cases a mandamus to call to the bar was refused, on the ground that the Inns of Court were voluntary societies, governed by their own rules, and subject only to the control of the Judges as visitors. In the second, this Court refused a mandamus to admit into the society, holding that there was not an inchoate right in the king's subjects generally to be admitted into such bodies. So the Court has refused a mandamus to a corporation to admit an inhabitant of the borough to be a free

(a) A formal objection was taken to this affidavit when it was first adverted to in shewing cause, viz. that the deponent gave no address or addition, but that of "Steward of the Society of *Gray's Inn*." No further allusion was made to the affidavit.

(b) April 22d. Before Lord Denman C. J., *Littleale*, *Patteson*, and *Coleridge* Ja.

(c) 1 Doug. 353.

(d) 4 B. & C. 855.

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burgess, where the claimant did not shew an inchoate right (a). The rules of 1654 and 1704, supposing that they had not fallen into disuse, only require attorneys to be admitted into one of the Inns of Court or Inns of Chancery. They furnish no ground for coming to this Inn in particular. [Coleridge J. That would be an argument for every Inn in turn] It shews that a party, to make this claim, ought to have an inchoate right of admission at some particular Inn. *Barnard's Inn* is a voluntary society, governed by its own rules as to the admission of members; and Mr. *Gresham* has not brought himself within those rules: there is nothing to shew that this Court can interpose. The case of a party wishing to enter himself of an Inn for the purpose of being called to the bar is much stronger than the present. There the admission is clearly necessary to the call; yet, if it be refused, the Court will not interfere. [Coleridge J. Do you admit that there is a controul anywhere, over the Inn?] This Court has none; and perhaps it could not be ascertained that there is any. *Rex v. Allen* (b) shews the difficulty of proving the existence of such a controul; and by the judgments delivered in *Rex v. The Benchers of Lincoln's Inn* (c) it appears that there is none for the present purpose. [Littledale J. In the rule of 4 Ann. (d), the words "if those honourable societies will admit them," are introduced after mentioning the Inns of Court, but not after the mention of the Inns of Chancery]. It does not appear that the Judges had a right to make rules which should oblige any of the Inns to receive members. These rules have not been formally rescinded; but they refer to a state of things quite different from that which

(a) See *Rex v. Mayor of West Looe*, 3 B. & C. 677.

(b) 5 B. & Ad. 984.

(c) 4 B. & C. 855.

(d) Anté, p. 20.

has existed since the admission of attorneys has been regulated by statute. The rules are not evidence that the Courts had the power of compelling the Inns to receive; nor even that they assumed such a power. It has long been an established rule of the Courts that no person shall be admitted to the bar who is not a member of an Inn; yet the Courts will not compel the Inn to call a person who is a member: the only resort is to the twelve Judges. Here, if there is any resort, by appeal, to the twelve Judges, or to any particular Inn, that is the course to be adopted. In *Rex v. The Benchers of Lincoln's Inn* (a) Lord Tenterden says, "It is true, that the twelve Judges are the visitors of the Inns of Court, but in that character they have jurisdiction only over actually admitted members." "It has been argued, that every individual has primâ facie an inchoate right to be a member of one of these societies, for the purpose of qualifying himself to practise as a barrister." "It might as well be said that every individual had an inchoate right to be admitted a member of a college, in either of the universities, or of the College of Physicians, or any other establishment of that nature." It has been suggested here, from the Bench, that to ask what right the party had to be admitted of the particular Inn would furnish an answer for every Inn in turn. But the same observation might be made if the question were asked as to admission into a college in one of the universities. And a person must have a degree from one of the universities, to practise in the Ecclesiastical Courts, or to be a member of the College of Physicians. There is nothing to distinguish this case from that of other Inns which are voluntary societies. The question is, whe-

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(a) 4 B. & C. 358.

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ther the party has any inchoate right to be a member of the particular society.

Kelly and Kennedy, contra. The Court will at all events not decide so important question as this on affidavits. The origin of these bodies, and the system upon which they were at first regulated, it at present obscure. Some historical illustration of them is found in Fortescue de Laudibus Legum Angliæ, c. 49, and in Mr. Amos's notes; and in the introduction to 3 Rep. (a). It is contended on the other side that the Inns are voluntary societies, bound by no rules but of their own making. If so, the interference of the King, Lord Keeper, Privy Council, and Judges, by the rules which have been cited, was illegal. But those rules must be considered as evidence that the Inns were once subject to the jurisdiction of the superior Courts and the orders of the Judges, and that there must have been a controul to which the societies were subject if they departed from those rules. The order of 12 Ja. 1. directs a general search in the Inns every *Michaelmas* term. Would that search have been a trespass? And can it be supposed that, by the rules of 1654 and 1704, attorneys were called upon to perform that which did not lie in their power? It is true that, in the rule of 1704, the order for obtaining admission into the Inns of Court is qualified by the words "if those honourable societies will admit them"; but there is no such qualification as to the Inns of Chancery in this rule; and perhaps, when the rules were made, a distinction may have been intentionally drawn between the Inns of Court and those of Chancery. [Coleridge J. In the rules of

(a) [P. xxxvi. Ed. Thom. & Fr. 1826.

1654 (a) there is no qualification as to either class of inns. *Littledale J.* If the rules were strictly binding, attorneys in all parts of the kingdom would be obliged to procure admission, and take chambers in the Inns.] It is true that the rules have fallen into disuse, and that many attorneys are not members of the Inns, probably from the great increase of attorneys without a corresponding increase in the number of Inns: still the rules are not repealed by the statutes passed since they were framed; and they are evidence, at least, of the constitution and duties of the several societies. And there are regulations affecting attorneys, contemporaneous with that of 1704 now in question, which are not interfered with by the statutes. It is asked, why a mandamus should be directed to *Barnard's Inn* in particular? But it is sufficient if a party, having right, makes his claim as to any Inn. [Lord Denman C. J. In *Rex v. The Bishop of London* (b) a rule nisi for a mandamus to the Bishop to license a lecturer was refused because the *Archbishop of Canterbury* had authority to license as well as the Bishop, and application had been made to the Bishop only.] The plea put in by Mr. *Baines* in *Baker v. Baines* (c) is inconsistent with the assertion that this is a mere voluntary society. [Lord Denman C. J. The plea is only that *Barnard's Inn* is lawfully constituted as one of the Inns of Chancery, and having certain immemorial rights. There is no denial of its being a voluntary association.]

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LORD DENMAN C. J. on the following day (*April 23d*) delivered judgment as follows:— We have looked into the authorities, but find nothing upon which this

(a) *Ante*, p. 19., note (b). (b) 13 *East*, 419. (c) *Ante*, page 19.

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case can be decided. We are therefore confined to the matter appearing on the affidavits; and in them we see nothing that gives us authority to interfere. The rule must, therefore, be discharged.

Rule discharged.

OWEN and WISH *against* BODY and GRIFFITHS.

An assignment to trustees for the benefit of all creditors who may execute the deed, is not valid, as against creditors who do not execute, if it authorise the trustees to carry on the debtor's trade, and contain such terms that the creditors subscribing would become partners in the business.

The trade in question being that of an hotel keeper, it is no objection to such an assignment that the debtor, when it was executed, had not a licence for retailing excisable liquors; there being no evidence that the trustees contemplated selling, or in fact sold, any liquors without such licence, and a licence having been procured two days after the execution of the deed.

THIS was a feigned issue directed by the Court under the Interpleader Act, 1 and 2 W. 4. c. 58. The question stated in the pleadings as having arisen between the parties was, whether the defendants or either of them were hindered or precluded by the indenture after mentioned, and by the circumstances of the case, which were stated in the declaration (but which it is unnecessary to detail here), from levying execution upon certain goods in that indenture mentioned. The plaintiffs alleged that the defendants were hindered and precluded &c.; which the defendants traversed.

On the trial before *Patteson J.*, at the *Exeter* Spring assizes 1835, it appeared that, on the 6th of *November* 1834, *Joseph Marchetti*, being indebted to the defendants and other persons, executed an assignment for the benefit of his creditors.

The assignment was by indenture of the above date, between *Marchetti* of the first part, the plaintiffs of the second part, and the several other persons whose hands and seals were thereunto subscribed, being creditors of *Marchetti*, of the third part. It recited that *Marchetti* had for several years carried on the business of an inn-keeper and lodging-house keeper, at *Torquay*; that

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several judgments had been obtained against him, and writs of *fi. fa.*, thereupon issued, were then depending, at the suit of the several persons, and for the several sums after mentioned (four of the debts, with the names of the creditors, not including any of the present plaintiffs or defendants, were then mentioned); and that the said writs of *fi. fa.* were then in process and execution. That *Marchetti*, being unable to pay the said debts, had requested the plaintiffs to pay off the same, and had proposed and agreed to assign over to them all his estate and effects upon the trusts after mentioned, to secure repayment to them of the said debts, and for the purpose of paying all his creditors: And that the plaintiffs had examined the affairs, and agreed to undertake the trust, and had accordingly paid certain sums, amounting together to 155*l.*, in satisfaction of the above four debts, and costs. Then followed an assignment by *Marchetti* to the plaintiffs, their executors, &c., for the purposes of the deed, of all his leasehold estate, household goods, stock in trade, debts, &c., estate and effects whatsoever, with power to enter into his dwelling-houses and premises, and to use and take possession of the goods, &c.: Habendum to the plaintiffs, their executors, &c., upon trust that they should, with all convenient speed, in such manner, at such time or times, and on such terms, as they should think most advantageous, sell the goods and chattels, and get in the debts: And further that the plaintiffs, or the survivor of them, his executors, &c., “shall and do, so long as they or he shall think it most desirable and advantageous so to do, continue and carry on the business of the said *Joseph Marchetti*, in and upon the dwelling-house and premises of the said *J. M.*, in their or his names or name or otherwise;

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otherwise; and shall and do pay and apply the monies to arise and be produced by and from the ways and means aforesaid, in the first place in and towards" (paying the costs of these presents, and carrying the trusts thereof into execution); "and in the next place shall and do retain and pay unto themselves, their executors," &c. "the said sum of 155*l.* so paid by them, the said *William Purchase Owen* and *William Wish*, as aforesaid, with interest," &c.; "and in the next place shall and do pay and satisfy all such sums of money as, in their or his judgment, shall be necessary to be paid, laid out, or expended, for rent, taxes, wages, insurances or otherwise, in the continuing and carrying on the business of the said *J. M.*, and in maintaining and keeping up the stock in trade by purchasing horses, carriages, and other articles and things, and shall and do pay the surplus of such money so to arise and be received as aforesaid, unto and amongst themselves the said *W. P. O.* and *W. W.*, and all other creditors of the said *J. M.* who shall have executed these presents, within three calendar months from the date hereof, rateably and proportionably, according to the amount of their respective debts, when and so often as there shall be sufficient money in the hands of the said *W. P. O.* and *W. W.*, their executors," &c., "to pay two shillings in the pound upon or in respect of their said debts, or as often as thereunto requested in writing by the major part in value of the said creditors, parties hereto, and, after the several payments aforesaid, shall and do pay the surplus of such money so to be received unto the said *J. M.*, his executors, administrators, or assigns."

Then followed a power of attorney to the trustees, to get

get in debts, &c.; a covenant by *Marchetti* for better granting and assigning, &c.; a power to the trustees to compound with debtors; clauses for the security of the trustees; a covenant by each of the creditors, parties to the indenture, with *Marchetti*, "to accept and take the dividend or dividends to arise and be produced out of and from the said goods and chattels and effects, in full satisfaction and discharge of his debt," and not from henceforth to sue or molest *Marchetti*, on account of any debt now due; and a covenant by the trustees for the faithful execution of the trusts; and that they "shall and will from time to time keep, or cause to be kept, proper books of account relating to the estate and effects of the said *J. M.*, and the management and disposal thereof, for the examination and inspection of the said other parties hereto, or any or either of them, at all times; and therein make, or cause to be made, true and proper entries of all receipts, payments, and disbursements, and of all other transactions, matters, and things requisite and necessary to shew the true state and condition of the said estate and effects; and shall and will, at the request of the said other parties hereto, or any or either of them, render a just and true account of all matters and things relating to the said trust, and make a just and faithful distribution of all such sum or sums of money as shall come to their or his hands by virtue hereof, according to the true intent and meaning of these presents." There was added a proviso, that the trustees should, and they were thereby directed to, "sell, dispose, and convert into money the whole of the said household goods and furniture, stock in trade, goods, chattels, and effects, immediately, or as soon as occasion may be, at any time hereafter, on being thereunto requested in writing by the major part in value of the

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the said creditors, instead of continuing on the said trade or business of the said *J. M.* as aforesaid": And, lastly, a proviso that creditors holding securities, and becoming parties to the indenture, should not be prejudiced as to such securities.

The deed was executed by the Plaintiffs (a wine-merchant and a builder) and by two other creditors; not by the defendants. The plaintiffs immediately afterwards took possession, and began carrying on the business; *Marchetti* continuing on the premises, but acting only in subordination to the trustees, and accounting to them if he received money. At the time of the assignment *Marchetti* had no licence for retailing exciseable liquors, having omitted to take it out in the preceding month. On the 8th of *November*, the trustees obtained a licence (*a*). The defendants, when the assignment was executed, had brought actions against *Marchetti* for their respective demands; and, after the execution of the assignment, (*November* and *December* 1834), they obtained judgment and issued writs of *fi. fa.*, which the sheriff executed by seizing goods mentioned in the indenture, and which were the goods in question in this cause. The executions were subsequent to the obtaining of the licence. Under the learned Judge's direction, a verdict was found for the plaintiffs, subject to the opinion of this Court upon certain objections to the assignment.

Erle, in *Easter* term 1835, moved for a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendants, on the grounds, First, that the deed was not a valid conveyance of the property, as against creditors not executing, being only a transfer

(a) See stat. 9 G. 4. c. 61. s. 14.

of it to the intent that the parties executing might carry on the business as partners ; and, secondly, that, at the time of the assignment, the business was illegal for want of a license, under stat. 9 G. 4. c. 61. A rule nisi was granted. In this term, *April* 30th,

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Crowder shewed cause. There was nothing in the conduct of the plaintiffs, after the execution of the deed, inconsistent with a desire to act openly, and beneficially to the creditors. Then as to the deed itself. First, setting aside the objection as to the license, this deed shews, in its provisions, a bonâ fide intention that the creditors shall have the benefit of the sale of *Marchetti's* effects, according to the best judgment of the trustees, and receive the advantages of the business, so long as it can be carried on : and it is calculated to carry that intention into effect. (He then recapitulated the clauses of the deed). *Holbird v. Anderson* (a) shews that a transaction of this kind is not invalid merely because its effect may be to give particular creditors a preference : and in *Pickstock v. Lyster* (b) it was decided that a deed, by which a debtor assigned all his effects to trustees for the benefit of his creditors, was good, though executed with intent to defeat the execution of an individual creditor, no purpose of fraud being proved, but the object being an equal distribution. In the present deed there is no ground for a suggestion of fraud ; all appears to be done with the view of producing the greatest benefit to the creditors, any one of whom was at liberty to come in ; and no benefit would accrue to *Marchetti* individually, except in the ultimate result, if the purposes of the assignment

(a) 5 T. R. 235.

(b) 3 M. & R. 371.

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should be fully answered. It is contended, on the other side, that the clause enabling the trustees to carry on the business would make those creditors who joined in the deed partners, and that they cannot be called upon to undertake such a responsibility. But this was the best mode of winding up the business, and the most advantageous to the creditors that could be suggested under the circumstances, and considering the nature of the trade. The intention of the clause was not fraudulent, nor was there any thing illegal in the course proposed; and it does not appear that the objection now made was taken by the creditors. No instance has been given in which a clause of this kind, which might or might not be beneficial to the creditors, has been held to invalidate an assignment. Then it is urged that the business was illegal, because no license had been taken out for retailing liquors, and the parties carrying on the trade would have been liable to penalties under stat. 9. G. 4. c. 61. s. 18. It does not appear that the trustees knew this fact at the time of the assignment; but they repaired the defect as soon as it could be done. [*Little-dale J.* The license wanted was only for selling exciseable liquors, not for carrying on the general business]. It cannot be said that, if a penalty was incurred for want of this license, the rest of the business was prohibited, and could not be a subject of legal transfer. It is true that *Marchetti*, in assigning his goods, sold and disposed of all the wines and liquors on the premises; but such a disposal of them, with all the rest of his effects, is not a selling within the terms of the statute; nor can the Court infer from such sale an intention that the trustees, who are to carry on the business, should carry it on unlawfully, by selling in
opposition

opposition to the statute. The clause for carrying on the business is subsequent to and distinct from the clause for selling the goods and chattels. Suppose they had sold the goods by auction, can it be said that, on account of the stipulation for carrying on the business, they could not have made a good title?

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Erle, contra. First, this is not a bonâ fide assignment within the authority of *Pickstock v. Lyster (a)*, because the goods are not conveyed for the direct object of their being converted into money, and applied in satisfaction of the debts, but to be traded with, and payments made from time to time out of the receipts, subject only to a power vested in the major part in value of the creditors to compel a sale if they think fit. It is an assignment on speculation, and upon such terms that the creditors in general may or may not think it prudent to come in. Such a deed is clearly within stat. 13 Eliz. c. 5. In the case of a regular assignment, the creditor coming in entitles himself to a dividend, and runs no risk. But here such a creditor would be a partner with the trustees, taking the profits of the hotel, liable for the debts incurred in carrying it on, and perhaps even subject to the bankrupt laws. No case can be cited in which a deed like this has been held valid. *Jezeph v. Ingram (b)* was the case of a mortgage to an individual creditor, and was discussed upon the question, whether there had been a sufficiently notorious transfer of possession. This is the gift accompanied with a trust, of which an instance is given in *Twyne's case*, second resolution (c), and which is said

(a) 3 M. & S. 371.

(b) 8 Taunt. 838.

(c) 3 Rep. 81 a.

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there not to be a bonâ fide conveyance within the proviso of stat. 13 *Eliz. c. 5. s. 6.* The trustees here might lawfully have sold, but they have elected to carry on the business, which they are not warranted in doing. The deed was one by which the creditors not coming in were delayed and hindered of their just actions and debts within the meaning of the statute, since they might justly object to subscribing a deed which would make them partners with the trustees.

This view of the case is strengthened by the remaining objection, as to the want of a license. The business was illegal on this account when the deed was executed; and the carrying on of such illegal business was a material part of the transaction which was concluded by that deed on the 6th of *November*. The contract was of the class prohibited by law, according to the distinction stated in *Forster v. Taylor (a)*. [*Littledale J.* The only ground of illegality that can be stated is that the trustees might have sold exciseable liquors. Unless they did so, I do not see how the transaction was unlawful.] The contract is made in contemplation of an illegal act. [*Littledale J.* Is it so, if, as soon as the trustees come in, they do all in their power to render the business legal? The license was actually obtained on the 8th of *November*. Lord *Denman C. J.* There was no covenant for beginning the business immediately. *Coleridge J.* Was there any evidence of liquors having been in fact sold before the 8th? None. [*Coleridge J.* You are not entitled to assume the fact.] It is not necessary to contend that the trustees had actually become liable to penalties. [*Crowder* mentioned *Brown v. Duncan (b)*].

(a) 5 B. & Ad. 387.

(b) 10 B. & C. 93.

Lord

LORD DENMAN C. J. If either of the points now urged on behalf of the defendants be maintainable, the assignment is invalid. One point is, that this was a contract for carrying on an illegal trade, because *Marchetti* had not a license for retailing exciseable liquors when the trustees took the property. But I think that objection comes to nothing, because no one was bound to do an illegal act: the parties might have proceeded upon the contract so as not to incur any penalty or violate any law. The other question is a very doubtful one, upon which we must take time to consider.

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LITTLEDALE, PATTESON, and COLERIDGE Js. concurred.

Cur. adv. vult.

LORD DENMAN C. J. on a subsequent day of the term (*May 5th*) said: — On consideration we think that, upon the second ground of objection, this assignment was not good. The deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid.

Rule absolute.

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JOHN GRAVES *against* SUSANNA JEMIMA HICKS.

Testator devised lands to trustees to raise an annuity for his widow, and, subject thereto, to the use of testator's son *William*, for life; remainder to trustees to preserve &c.; remainders to the use of *William's* first, second, and every other son successively in tail male; and, on failure of such issue, then (subject to a further annuity for the widow) to the use of his grandson *J. G.*, the son of his late daughter *Sophia G.*, for life; remainder to the use of trustees to preserve &c.; remainders to the use of the first, second, and every other son of *J. G.* successively in tail male; and, on failure of such issue, to the use of trustees, in trust for the first, second, and every other son of testator's daughter *Anna Maria* successively in remainder (as in the two preceding devises) in tail male; and, on failure of such issue, in trust for testator's right heirs. Powers were given to *William*, and to *J. G.*, when in possession, to charge the estates with portions for younger children. There were further bequests to the testator's widow, and his said daughter *A. M.*

By a codicil, reciting that, since the date of the will, testator's son *William* had died without issue, the testator altered his will as to certain lands not now in question, and charged the lands devised as above with further annuities to his wife and to *A. M.* By a second and third codicil he made his wife his executrix and residuary legatee, and gave a further legacy to *A. M.*

By a fourth codicil (made sixteen months after the date of the will) the testator recited that he thereby revoked "several of the dispositions" by him theretofore made, and instead thereof he devised all his estates to his daughter *A. M.*; and, from and after the determination of that estate, he devised the same to *J. G.* "and his heirs in strict entail, as in my said will directed," with the additional clause, that, if *J. G.* should not be thirty-one years old when the estates should devolve on him by the death of *A. M.*, he should not take possession till he attained that age, but the rents should accumulate and be in the hands of trustees for the benefit of *J. G.* "and his heirs;" "and in failure of issue of the said *J. G.*" the testator ordered that his estates should go over as was by the will directed. At the date of the codicil *J. G.* was eleven years old.

Held that, under the will and fourth codicil, *J. G.* took a life estate only.

THE Vice-Chancellor sent the following case for the opinion of this Court:—

John Hicks, of *Plomer Hill House*, in the parish of *West Wycombe, Bucks*, was, at the time of his making the will and codicils now in question, and until his death, seised in fee of the estates after-mentioned. He made his will, duly executed and attested, bearing date *May 4th, 1821*.

He thereby devised his copyhold messuage or mansion-house, lands, and hereditaments, called *Plomer Hill House*, in the parish of *West Wycombe*, to four trustees in fee for his wife *Susanna Jemima Hicks* during her life or widowhood, or until she should cease to reside at the premises, or let the same, &c.; and, from and after her death, or other events referred to, the trustees were

to stand seised on such trusts, &c., as might best correspond with the uses, trusts, &c., declared as to the residue of the testator's real estates. And he devised his freehold estate in *Cornwall*, called *Treravel*, to the trustees in fee, to the use of the trustees, their heirs, &c., during the respective lives of testator's niece *Frances*, the wife of *William Mountstevens*, and of testator's daughter *Anna Maria*, the wife of *Francis Hearle*, and the life of the survivor of them, in trust to raise out of the rents, &c., an annuity of 20*l.*, and pay the same to such person as *Frances Mountstevens* should appoint, and to herself for her own use, in default of appointment: and to pay the residue of the rents, &c., to such person as *Anna Maria* should appoint, or to herself in default of appointment; but, in case *Frances* should die in the lifetime of *Anna Maria*, the whole rents, &c., to be paid to the latter, as was above directed with respect to the residue: and, from and after the decease of *Anna Maria*, then, subject to the above annuity, to the use of her child, or of her children, as tenants in common, in tail: and, for default of such issue, to the uses declared as to the residue of the testator's real estates. And he devised his manor of *Bradenham*, in the county of *Buckingham*, and the advowson of the living of *Bradenham*, and certain freehold farms in the same county, and all the rest and residue of his real estates whatsoever and wheresoever (subject to such incumbrances as might exist at the time of his death under any marriage settlement or otherwise), to the trustees in fee, to the following uses; viz. that his wife might, during her widowhood, receive thereout an annuity or rent-charge of 300*l.*, with power of distress, &c.: and, subject thereto, to the use of testator's son *William*

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Thomas Horatio Nile Nelson Hicks, and his assigns, during his life (with a devise to the trustees to support contingent uses and estates); and, immediately after the decease of *William*, to the use of the first, second, and every other son of the said *William*, severally and successively in remainder one after another, according to the priority of their respective births, and the heirs male of the body of each such son, so that every elder of the same sons, and the heirs male of his body, should always be preferred to every younger of the same sons, and the heirs male of his body: and, on failure of such issue, to the use that *Susanna* should take a further annuity or rent-charge of 100*l.* during her life or widowhood, with power of distress, &c.; and the trustees take a further annuity or rent-charge of 100*l.* for *Anna Maria's* sole use, during a term of 99 years if she should so long live. The will then proceeded as follows: —

“ And as to the said manor and other hereditaments and premises lastly hereinbefore devised, the same shall (subject to the uses, estates, and charges hereinbefore mentioned) remain and be to the use of my grandson *John Graves*, the only son of my late daughter *Sophia Elizabeth Graves*, deceased, by *Charles Gray Graves*, and his assigns, during the term of his natural life, without impeachment of waste; and, immediately after the decease of the said *John Graves*, to the use of the said *Joseph Holden Strutt* and *George Farr*” (two of the before-mentioned trustees) “ and their heirs, during the natural life of the said *John Graves*, upon trust to support the contingent uses and estates hereinafter limited; nevertheless to permit and suffer the said *John Graves*, and his assigns, during his natural life, to receive the rents, issues, and profits of the same manor,
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and other hereditaments and premises; and, immediately after his decease, to the use of the first, second, and every other son of the said *John Graves*, severally and successively in remainder one after another, according to the priority of their respective births, and the heirs male of the body of each such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons, and the heirs male of his body; and, on failure of such issue, to the use of the said *Joseph Holden Strutt* and *George Farr*, their heirs and assigns, in trust for the first, second, and every other son of my daughter the said *Anna Maria Hearle*, severally and successively in remainder one after another, according to the priority of their respective births, and for the heirs male of the body of each such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons and the heirs male of his body; and, on failure of such issue, in trust for my own right heirs for ever." Proviso, that, i. any son or sons of *Anna Maria* should be born in the testator's lifetime, the estate in tail male thereby devised unto or in trust for him should cease, and the manor, &c., lastly devised vest in the two trustees, in trust for each such son and his assigns during his life; and, after his decease, in trust for his respective first and every other son, severally and successively, according to his respective seniority in tail male.

After some other clauses (giving powers to the son to charge the manor and hereditaments last devised with jointure, and with portions for younger children, to a certain amount, and like powers to the son and grandson as to the residuary estates, when they should be in possession of, or entitled to, the rents and profits of the residuary

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duary estates ; and giving also certain powers of leasing), the testator bequeathed all his money in the funds to the first-mentioned trustees, their executors, &c., in trust to pay the interest and dividends to, or permit them to be received by, his wife *Susanna*, during her life or widowhood, and, after her death or second marriage, to stand possessed of the stocks, dividends, &c., in trust for the person who, under this will, should, "either as tenant for life or in tail male, be in the actual possession of" the testator's "residuary real estate herein-before devised, or entitled to the rents and profits thereof." A power was given to *Susanna* to appoint out of the trust-moneys, stocks, &c., any sum not exceeding 500*L.*, to be raised and applied for the benefit of testator's son *William*, and his daughter *Anna Maria*, or either of them. He bequeathed to his wife all his ready money which should be in *Plomer Hill House* at the time of his death, certain articles of plate, his family carriage, and the wines, &c., live and dead stock, which, at his decease, should be on the *Plomer Hill* premises, for her own absolute use. And he bequeathed all the household goods, furniture, books, pictures, plate, &c., not before bequeathed, which should belong to him at his death, to the first-mentioned trustees, their executors, &c., in trust for his wife, so long as she should be entitled to the premises first devised; and, immediately after the determination of her estate therein, then in trust, absolutely, for the person who, under the will, should then, either as tenant for life or in tail male, be in the actual possession of his residuary real estate before devised, or entitled to the rents and profits thereof. The testator then, after legacies to servants, bequeathed all the residue of his personal estate, not before specified, to his son
William,

William, charged with payment of debts, funeral expenses, and legacies, which, if the residue of personalty should be insufficient, were charged on the funded property before bequeathed; and, if that should be insufficient, the deficiency was charged upon the residue of realty. And it was declared that the devises and bequests to *Susanna* were in addition to the annuity or rent-charge of 200*l.* settled upon her on her marriage with the testator, but in lieu of all dower and thirds out of his real estates; and that the provisions for his daughter *Anna Maria* were in addition to what she and her husband had received before or since their marriage, but in bar and satisfaction of all claims to any real or personal estate which she might make under the last-mentioned settlement. The testator appointed his son *William* and the first-mentioned trustees his executors.

By a codicil, dated *May* 10th 1822, reciting that, since the execution of the will (*viz.*, on the 5th of *February* last), the testator's only surviving son, *William*, had died unmarried and without issue, and that, in consequence thereof and for other reasons, the testator was desirous of making such additions to and alterations in his will as were after mentioned; the said testator devised his estate of *Treravel*, from and immediately after the decease of *Anna Maria Hearle*, to the use of *Francis Hearle*, her husband, if he should survive her, and his assigns, for his life (subject to the annuity of 20*l.* thereon charged); and, from and immediately after his decease, to the uses, &c., directed by the will to take place from the decease of *Anna Maria*. And he charged the manor and advowson of *Bradenham*, and the other residuary real estates, with the payment of a further annuity or rent-charge to his wife *Susanna* of 100*l.*; and a further annuity

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annuity of 200*l.* to the before-mentioned trustees for *Anna Maria*, during the term of 99 years, if she and her husband, or either of them, should so long live, upon the same trusts as the former annuity; and an annuity or rent-charge of 100*l.* to *Francis*, during his life. And he revoked the former bequests of plate, &c., and of his carriage, and of the wines, &c., at *Plomer Hill*, and of household goods, furniture, books, &c.; and, in lieu thereof, bequeathed all his effects at *Plomer Hill*, including the articles of plate first mentioned in the will, and his carriages there, &c., to his wife absolutely. He also charged the residue of his personalty (if sufficient) with an annuity of 30*l.* for a certain time, towards the education of his great nephew, *John Mountstevens*, son of *William Mountstevens*, if (as the testator expressed his wish to be) the said *J. M.* should be educated for holy orders; and he bequeathed to him, if he should qualify himself for the church, the next presentation of the living of *Bradenham*. And the testator bequeathed the residue of his personalty, formerly left to his son *William* (subject &c.), to his said wife *Susanna*; and, in case of her death in the testator's life-time, then to his nephew, ——— *Mountstevens*, the eldest son living of the said *William Mountstevens*.

By a second codicil, *July 15th 1832*, the testator appointed his said wife *Susanna* sole executrix and residuary legatee.

By a third codicil, *July 18th 1832*, he gave the proceeds of five shares in the County Fire-office to his wife, for her life; and after her death to *Anna Maria Hearle* and her husband, and the survivor of them, for their lives; and, after their decease, to the testator's "heir" in possession of his *Bradenham* and other estates.

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A fourth codicil was added, as follows, dated *September 14th 1822* :—" And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold, and personal estate and effects of all and every kind and description; and, instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold and copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated; unto my daughter *Anna Maria Hearle*; and, from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson *John Graves* and his heirs in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that, in case the said *John Graves* should not be thirty-one years of age at the time my said estates shall devolve upon him by the death of my daughter, he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and, in failure of issue of the said *John Graves*, I order that my said estates and effects shall go and descend as is by my said will directed." And I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed. . And I do further give and bequeath unto my dear wife *Jemima* one other annuity of 100*l.*, to be paid her in like manner and with the like restrictions as the former ones given by my will and codicils, hereby in all other respects but

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but what is above-mentioned confirming my said will and codicils.

By a fifth codicil, dated *July 3d 1823*, the testator, expressing his will that what he had left his daughter should be independent of her husband, ordered and directed that her lease or appointment of or on the said estates should be valid, and that her receipt should be a discharge for any rents or other monies paid to her; notwithstanding her coverture: but he left to her husband the rents and profits of *Treravel* during his life (subject to an annuity of 20*l.* to his niece *Mrs. Mountstevens* for her life only), and also a further annuity of 100*l.* during his life out of the *Bradenham* estates. And he gave and confirmed to his wife, and at her own disposal, all sums of money which she or the testator might be entitled to out of the effects of her late father, or that any other friend might leave her; and he ordered his executors, if she should die before him, to fulfil her will and disposal thereof.

The testator's son died, as above recited, unmarried and without issue, after the date of the will, and before the making of the first codicil. The testator himself died, *June 21st 1825*. At his death, *Anna Maria Hearle* and *John Graves* were the testator's heirs-at-law; *John Graves* being the only child of a deceased daughter of the testator, and *A. M. Hearle* being the only other child of the testator living at the time of his death. *John Graves* is living, and unmarried: he was born *January 25th, 1811*. In *November 1825*, *John Graves*, by his next friend, instituted a suit in Chancery against *Susanna Jemima Hicks*, the testator's widow, *Francis Hearle* and *Anna Maria* his wife, and the trustees of the testator's will and codicils, to have the trusts of the will and

and codicils carried into execution, and the rights of the parties under them ascertained. The Vice-Chancellor, after hearing the cause, *Graves v. Hicks* (December 5th and 9th 1836), ordered a case to be stated for the opinion of this Court, and that the questions in the case should be—"Whether, under the will and codicils of the said testator (subject to the preceding estates for life), the said plaintiff, *John Graves*, takes an estate for life, or an estate in tail mail, or an estate in tail general, in the real estates of the said testator respectively; and what is the estate which the said plaintiff, *John Graves*, takes in each of the estates in *Buckinghamshire* and *Cornwall*, under the said will and codicils?"

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The case was argued in this Court in *Michaelmas* term, 1836 (a).

Sir *John Campbell*, Attorney-General, for the plaintiff *John Graves* takes, by the will and fourth codicil, an estate in tail general, on the determination of the life-estate limited to *Mrs. Hearle*. The question will turn upon the intent to be collected from the fourth codicil and the will taken together. By the will, *John Graves* took only a life estate; but the codicil expands that into an estate tail, by the words "unto my grandson *John Graves* and his *heirs*, in strict entail," and "*in failure of issue of the said John Graves*." To maintain that *John Graves* took no larger estate under the codicil than under the will (namely, a life estate with remainders to his sons successively in tail male), it must be shewn that the testator intended, if his grandson left daughters, or sons leaving daughters,

(a) November 20th. Before *Patteson*, *Williams*, and *Coleridge* Js.

that

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that none of those daughters should take. Of the testator's two children, *Anna Maria Hearle* and *Sophia Elizabeth Graves*, the mother of *John Graves*, it appears that he had an equal affection for both; indeed the grandson by the latter daughter seems to be a particular object of his bounty. Yet, upon the present supposition, the descendants of that daughter may be disinherited, notwithstanding the fourth codicil. But the codicil in express terms revokes the former will, so far as the will and codicil are inconsistent. An estate of inheritance seems to be given by this codicil to *John Graves* as a compensation for interposing a new life estate before his, and deferring his possession till he attains the age of thirty-one. The technical word "heirs" is used. And it seems intended that by the codicil *John Graves* should take a different estate from that given in the will, because, otherwise, the testator would have merely said that, after the determination of *Anna Maria's* estate, the estates should go as is by the will directed; which expression is used in a subsequent part of the codicil, where no alteration is intended in the mode of descent. The words "in failure of issue of the said *John Graves*" (not "such issue," or "issue male," or "such issue as described in my will") shew a paramount intent in the testator, that, while there is issue, whether male or female, of *John Graves*, the estates shall not go over. And wherever a paramount intent is shewn that the estate shall not go over until failure of issue of the first devisee, he takes an estate tail, to accomplish the intent, whatever may be the form of words used in the devise. This principle was acted upon in *King v. Rumball* (a); and the rule of construction

(a) *Cro. Jac.* 448.

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is an established one. The doctrine, that the paramount intent must over-rule the particular, has been thought less accurate than the rule laid down by Lord *Redesdale* in *Jesson v. Doe dem. Wright (a)*, that "technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." This point is discussed in the judgment of Lord *Denman* in *Doe dem. Gallini v. Gallini (b)*, where 2 *Powell on Devises*, p. 552. (c), is cited. But here technical words are found, bearing the sense contended for by the plaintiff. The codicil mentions "heirs," and the body from which they are to spring, and the event on which the estate is to go over, viz. in "failure of issue" of *John Graves*. If the testator, in the body of the will, after the devise to the sons of *John Graves* and to their heirs male, had added "and on failure of issue" (instead of "failure of such issue"), the paramount intent evinced by these words must have prevailed, and an estate in tail general must have passed to the son of *John Graves*. The present case is stronger, because the words "on failure of issue" are added to the will after a lapse of time, and may have been intended to meet a new state of things. (He then cited, in illustration of the doctrines as to paramount intent, or the operation of technical words, *Robinson v. Robinson (d)*, *Coulson v. Coulson (e)*, *Roe dem. Thong v. Bedford (g)*, *Doe dem. Blandford v. Applin (h)*, *Doe dem. Cole v. Goldsmith (i)*, *Jesson v. Doe dem. Wright (k)*).

(a) 2 *Bligh*, 57.(b) 5 *B. & Ad.* 640. See *S. C.* in Error, 3 *A. & E.* 340.(c) *C.* 27. s. 5. 3d ed. by *Jarman*. (d) 1 *Burr.* 38.(e) 2 *Str.* 1125. 2 *Atk.* 246, 7. (g) 4 *M. & S.* 362.(h) 4 *T. R.* 82.(i) 7 *Taunt.* 209.(k) 2 *Bligh*, 1.

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In this case it is very doubtful, considering the words of revocation with which the fourth codicil begins, whether that which may be called the particular intent any longer appears in the codicil.

An endeavour may be made to defeat the effect of the word "heirs" in the codicil, by reference to cases in which that word has been held tantamount to "son or sons." Several of those cases are collected in 2 *Powell on Devises*, 488 (a); and were relied upon in argument, but without success, in the late case of *Jack v. Fetherston* (b). The rule is that, if the word "heirs" be so used that a doubt may exist whether it be used in the proper technical sense, or as meaning only "son or sons," the technical sense shall prevail; otherwise, if the context excludes any doubt, as in *Lowe v. Davies* (c). Here, even without resorting to the words "in failure of issue," the word "heirs," with the context, clearly shews that an estate tail was contemplated. [Coleridge J. The words are, "unto my grandson *John Graves* and his heirs, in strict entail, as in my said will directed." Suppose the language had been "in strict settlement, as in my said will directed;" would not that have tied down the clause to the sense of the preceding one in the will?] If those had been the only words, they might perhaps have been said to explain the meaning of "heirs," according to *Lowe v. Davies* (c). But in a subsequent part of this codicil "heirs" is used without any qualifying expression; "for the use and benefit of my said grandson and his heirs:"

(a) C. 23. s. 3. 3d ed. by *Jarman*.

(b) *D. P. Error from the Exchequer Chamber in Ireland*, 9 *Bligh*, N. S. 237. (Not reported when the present case was argued).

(c) 2 *Ld. Raym.* 1561.

and the words which follow, "and in failure of issue of the said *John Graves*," are decisive. The expression "strict entail" has not any known meaning; "strict settlement" has. But, even if there be a doubt whether "heirs" is used in the technical sense or not, that sense must prevail. In *Poole v. Poole (a)*, where the words "heirs male" (of the testator's first son) were used, the testator's intent did not plainly appear to be that his first son should not take an estate of inheritance; and therefore it was held that the words of devise (considering the estates devised as legal ones) gave him an estate tail.

The same principle of construction was adopted in *Jack v. Fetherston (b)*. The words of devise there were, I give, &c. to *William Fetherston*, "and to his heirs male according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal in lands, houses and tenements not hereinbefore disposed of, the elder son surviving of the said *William Fetherston* and the heirs male of his body lawfully begotten always to be preferred to the second or younger son: and in case of the failure of issue male in the said *William* surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to *Theobald Fetherston*, brother of the said *William*, and his heirs male lawfully begotten, on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said *Theobald* lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs for ever."

(a) 3 B. & P. 620.

(b) 9 Bligh, N. S. 237. See p. 50. *antè*.

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There it was held that the words of devise gave an estate tail, and not a life estate only, to the first devisee; the expressions, "the elder son surviving of the said *William Fetherston*, and the heirs male of his body," had a very strong tendency to shew that the eldest son was intended to be the stirps from which the estate of inheritance should commence; but the subsequent words rendered that questionable; and therefore the House of Lords would not say that the estate tail, clearly given to *William Fetherston* by the first words of devise, was cut down by the subsequent clauses. In the present case, to cut down the estate tail given in the beginning of the codicil, the subsequent words "in failure of issue of the said *John Graves*" must be qualified in a manner not warranted by any principle or authority, namely, by reading them as "in failure of issue male of *John Graves's* first and other sons."

It has been held that a clause giving an estate tail ought not to be cut down by inference from subsequent words, where the effect of such a construction would be to exclude children of the first taker who were apparently not meant to be excluded. Thus in *Langley v. Baldwin* (a), where the devise was to *A.* for life, remainder to his first, second, and so to his sixth son, and, if *A.* should die without issue male of his body, then to *B.* in fee; it was decided that, as there was no limitation beyond the sixth son, and as *A.* might have a seventh and other sons, who were not meant to be excluded, therefore, to let in those sons, *A.* must be held to take an estate tail. Here, by the limited construction

(a) 1 *Eq. Ca. Abr.* 185. cited in *Attorney-General v. Sutton*, 1 *P. Wms.* 759. See *Allanson v. Clitherow*, 1 *Ves. sen.* 26.; *Vaughan v. Ferrer*, 2 *Ves. sen.* 186.

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insisted upon for the defendant, the daughters of *John Graves* would be excluded. The principle of the last cited case was acted upon by Lord Chancellor *Hardwicke* in *Allanson v. Clitherow* (a). In *Bankes v. Holmes* (b), where the words "without issue" were used in a devise, the House of Lords refused to construe them as "without such issue as aforesaid;" though the case was one in which, if possible, such a construction would have been favoured.

It may, perhaps, be contended that *John Graves* was intended to take an estate in tail general after the determination of the estates given to his first and other sons; and *Doe dem. Bean v. Halley* (c) may be cited. But in that case there was a clearly expressed intention to prefer all the issue male of the person first named to the family afterwards named to take in remainder: in the present codicil no intention is shewn to exclude daughters of *John Graves*, or of any of his sons.

Cowling, contra. The fourth codicil, when taken in connection with the will and other codicils, shews the testator's intention to have been that the plaintiff should still take in the manner originally pointed out in the will. Three properties are devised by the will. (He then read the respective limitations as to *Plomer Hill*, *Treravel*, and *Bradenham* with the residuary estates). The plaintiff, by the original devise, took a remainder for life only, expectant on the determination of the estates limited to *William*, the testator's son, and *William's* first and other sons, with remainder over to the

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(a) 1 Ves. sen. 24.

(b) Cited in *Morse v. Lord Ormonde*, 1 Russ. 394, and note (a) *ibid*.

(c) 8 T. R. 5.

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plaintiff's first and other sons, in tail male. *William* died unmarried, and without issue; and in consequence the first two codicils were made, adding some new devises and bequests, and making the testator's wife sole executrix and residuary legatee. The fourth codicil also was framed to provide for the consequences of *William's* death. *John Graves*, the grandson, being then only eleven years old, the testator did not wish, in case of his own decease, that *Bradenham* and the residuary estates should vest in so young a person: he therefore interposed a life estate in *Mrs. Hearle* (whom, in the preceding codicil, he had shewn an increased disposition to favour), with a direction that, in case of her death, the rents and profits should be received by the trustees till *John Graves* attained the age of thirty-one. These, and the addition of a new bequest to the testator's wife, are all the purposes of the fourth codicil; for it has been decided that the words of revocation with which it begins apply to the residuary property only: *Doe dem. Hearle v. Hicks (a)*. [*Patteson J.* The codicil says, that the rents and profits shall accumulate in the hands of the trustees for the use of *John Graves* and his "heirs." That shews that the testator uses the word "heirs" very loosely]. "Heir" is used perhaps as inaccurately in the third codicil.

The words of the codicil, then, being "unto my grandson *John Graves*, and his heirs in strict entail as in my will directed," if it is held that an estate tail is given, the words "as in my will," &c., become inconsistent. And it would be in the power of the devisee to cut off the entail, in direct contradiction to the will.

(a) 8 Bing. 476.

[*Patteson J.* That argument would apply to the will itself. The first or other son of *John Graves* taking under the will might have cut off the entail]. According to the plaintiff's construction, Mrs. *Hearle's* family were disinherited by the codicil, though it appears that, down to the time of making it, the testator's favour towards her had increased. By the will, the funded property is left, ultimately, in trust for the person who shall, "as tenant for life or in tail male," be in possession of the residuary real estate, or entitled to the rents and profits. Under the fourth codicil, according to the argument for the plaintiff, the destination of the residuary real estates is changed, without any corresponding change as to the personalty; yet no reason appears for a distinction between them. If, notwithstanding these objections, a paramount intent be relied upon, it lies on the plaintiff to shew such an intent. The words "as in my said will directed" have the same effect as if the devise in the will were repeated in the codicil. And, in *Doe dem. Hearle v. Hicks (a)*, *Tindal C. J.* (after referring to the clause in which the words occur) says, "the only alteration effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to *John Graves*." As to the words "in failure of issue of the said *John Graves*," the rule is that, where a particular class of issue has been mentioned, the words "in failure of issue" shall be construed to mean "such issue." Thus in *Blackborn v. Edgley (b)* the testator devised his freehold estate to certain persons in trust to convey the

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(a) 8 Bing. 488.

(b) 1 P. Wms. 600.

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same to *Hewer Edgley* for life, remainder to trustees during *H. E.*'s life, to preserve contingent remainders; remainder to his first, &c., son in tail male; remainder to his daughters in tail general, as tenants in common; remainders over in fee, "if *H. E.* should die without issue." It was contended that by these last words *H. E.* took an estate tail; and the rather, because "otherwise the daughters of his son could never take, which would be against the testator's intention:" but Lord Chancellor *Parker* said, "If I devise an estate to *A.* for life, and after his death without issue, then to *B.*, this will give an estate tail to *A.*" "But here being a limitation upon *H. E.*'s death to his sons, and after to his daughters, the following words [*if Hewer Edgley should die without issue*] must be intended, if he should die without such issue:" and it was held that no estate tail passed. That decision is in point. In *Langley v. Baldwin* (a) there was not a class of issue mentioned; the limitations were to the first, second, and so on to the sixth son, of the first devisee; and that was relied upon in the decision. In *Doe dem. Bean v. Halley* (b) the devise was to *M. H.*, remainder to his eldest son lawfully to be begotten, and the heirs of such eldest son; and, in default of issue male of *M. H.*, then over. There the words "issue male" could not be taken to mean "such issue." The objection made in the present case, that, upon the defendant's construction of the codicil, daughters would be excluded, was also taken, but did not prevail, in *Blackborn v. Edgley* (c). And it is observable, that, in the present case, powers are given by the will to the testator's son and grandson to charge

(a) Cited 1 *P. Wms.* 759. See p. 52. *antè.*(b) 8 *T. R.* 5.(c) 1 *P. Wms.* 605.

the estates with portions for younger children. In *Morse v. Marquis of Ormonde* (a) the testatrix devised estates in trust for her daughter for life; remainder to the use of the first and other son and sons of her daughter successively in tail male; remainder, in default of such issue, to the daughter and daughters of her said daughter, if more than one, as tenants in common in tail; cross remainders between them in tail; remainder to an only or only surviving daughter in tail; remainder, in default of *all such issue* of her said daughter, to trustees for a term, to raise and pay such legacies as were in that will after bequeathed. And she afterwards, by that will, bequeathed certain legacies, from and immediately after the decease and *failure of issue* of her said daughter. It was contended that the legacies were too remote, because they were made to depend on a failure of issue generally; and that the term vested at one time, and the legacies became payable at another; but *Leach* V. C. held that, having regard to the whole context, the words "failure of issue" might be construed as meaning failure of "issue of my said daughter as aforesaid:" and, on appeal, this judgment was affirmed (b). So here, "on failure of issue," in the codicil, is in effect only a repetition of the words "on failure of such issue" in the will.

The cases, including *Robinson v. Robinson* (c) and *Coulson v. Coulson* (d), where the construction has been governed by the paramount intention of the testator, cannot assist the plaintiff here, because the construction insisted upon by him is against the paramount intent.

(a) 5 Madd. 99.

(b) *Morse v. Lord Ormonde*, 1 Russ. 382.

(c) 1 Burr. 38.

(d) 2 Stra. 1125. 2 Atk. 246, 247.

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Jack v. Fetherston (a) is no authority for the plaintiff. The devise there was to *William Fetherston* and his heirs male according to seniority, on their respectively attaining twenty-one. There was no prior devise inconsistent with this. Looking at the words "heirs male" as they were there used, there could be no doubt that those "heirs" were intended to take by descent; and the rule in *Shelley's* case (b) of course applied to the estate of the first devisee. *Doe dem. Bosnall v. Harvey* (c) is a case of the same class. In *Bennett v. Lowe* (d), where the devise was to and equally amongst A., B., and C., and, if any of them should happen to depart this life leaving a daughter or daughters, then the share of her so dying to go to such daughters according to seniority, and, in case A., B., or C. should die "without issue" in the lifetime of certain other parties, her share was devised over, it was held (the case being argued with reference to the context, and to intention) that the words "without issue" did not enlarge the estates of A., B., and C., to estates tail. In the present case, looking to all the provisions of the fourth codicil, there appears an intention rather to restrict than extend the interest to be taken by *John Graves*. At all events, the plaintiff's construction of the codicil ought to be clearly made out, as it operates in revocation of the estate formerly given to Mrs. *Hearle's* family. A reasonable doubt whether or not such revocation was intended will not suffice. This is laid down by *Tindal* C. J. (as to another devise in this will) in *Doe dem. Hearle v. Hicks* (e). It is also sug-

(a) 9 *Bligh*, N. S. 237.(b) 1 *Rep.* 104 a.(c) 4 *B. & C.* 610.(d) 7 *Bing.* 535.(e) 8 *Bing.* 480.

gested there by the Lord Chief Justice that the testator appears to have framed the fourth codicil without legal assistance: no stress, therefore, ought to be laid upon particular expressions in that codicil, varying from those used in other parts of the will.

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Sir John Campbell, Attorney-General, in reply. The question in *Doe dem. Hearle v. Hicks* (a), as stated by Tindal C. J., has no bearing on that now before the Court, which is as to the operation of the fourth codicil, reference being had to the death of the testator's son, which took place before that codicil was executed. The argument, that to give an estate tail to the first devisee would enable him to defeat the testator's intention by cutting off the entail, may be used in every case where the question is whether a first devisee takes in tail or for life (b). Supposing the rule to be correctly laid down, that, where an estate is limited to a class of issue, a devise over "in failure of issue" must be construed as if it were "in failure of *such* issue," that does not apply to a case where the words "in failure of issue" are added in a codicil, after a change in the state of the family. But no authority has been cited, establishing the supposed rule as a general proposition. *Blackborn v. Edgley* (c) shews only that, under certain circumstances, the words "without issue," may mean "without *such* issue." In *Morse v. Marquis of Ormonde* (d) the words upon which the question arose were "failure of issue;" but the words of limitation in a prior part of the will, having reference to the same event, were, "in default of all such

(a) 8 Bing. 479.

(b) See judgment in *The Earl of Scarborough v. Doe dem. Savile*, 3 A. & E. 963, 964.

(c) 1 P. Wms. 600.

(d) 5 Madd. 99. 1 Russ. 382.

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issue." The word "such" might reasonably be carried on from one clause to the other. In *Bennett v. Lowe* (a) the reasons of the judgment do not appear; but, in the argument which prevailed, the particular circumstances of the devise were insisted upon; as that the testatrix knew how to employ proper words of inheritance where such words were requisite; that, if the first class of devisees took more than life estates, the property might descend to males, whom the testatrix evidently meant to exclude; and that the words "without issue" were clearly explained by the preceding clause, which provided that, if any of the devisees should die, "leaving a daughter or daughters," the share of her so dying should go "to such daughters," as they should be in seniority. Regard was had both to the general and to the particular intent, in the construction there adopted.

Cur. adv. vult.

The following certificate (dated *February 2d, 1836*), was sent in the ensuing vacation:—

This case has been argued before us by counsel, and we are of opinion that the Plaintiff, *John Graves*, takes an estate for life in each of the estates in *Buckinghamshire* and *Cornwall*, under the will and codicils mentioned therein.

J. PATTESON.

J. WILLIAMS.

JOHN TAYLOR COLERIDGE.

(a) 7 Bing. 535.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1836.

IN THE

Court of KING's BENCH,

AND

ON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Sixth Year of the Reign of WILLIAM IV.

The Judges who usually sat in Banc in this term were,

Lord DENMAN C. J.

PATTESON J.

LITTLEDALE J.

WILLIAMS J.

HARVEY *against* GRABHAM and Another.

ASSUMPSIT. The first count stated that, whereas heretofore, to wit 6th *February* 1834, by a certain agreement between the plaintiff of one part and the defendants

1. In assumpsit, the first count recited an agreement that plaintiff should grant, and defendant take, a lease of lands; and that all straw, &c. which should be on the lands when possession was given up to defendant, should be valued to plaintiff by persons named respectively by plaintiff and defendant, and the amount paid to plaintiff by defendant: that, on the execution of the lease, defendant should accept it, and execute a counterpart; and that either party, making default in performance, should forfeit 300*l.*: mutual promises to perform the agreement: that defendant entered under the agreement, and took possession of the straw, &c.: that afterwards defendant proposed that the straw, &c., should be valued to plaintiff by *D.*, on the respective behalves of plaintiff and defendant; that plaintiff assented: that the straw, &c., was valued to plaintiff by *D.*; that plaintiff was ready to grant the lease according to the

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the agreement, but defendant did not pay the amount of the valuation.

Second count for goods bargained and sold, and taken by the defendant under such bargain and sale.

Plea to the first count, that the first agreement was in writing, signed by plaintiff and defendant; and the proposal and assent that *D.* should value, only verbal. To the second

count, that the goods consisted of straw, &c., which were bargained and sold under a written agreement between plaintiff and defendant, according to which they were to be valued by persons chosen respectively by plaintiff and defendant; and that no such valuation had been made, but only a valuation by *D.*: that defendant was ready, and had proposed, that they should be valued as in the agreement; but plaintiff refused.

Replication, 1., to the plea to the first count, that, by the proposal and assent, and the valuation accordingly made, plaintiff and defendant respectively waived performance of so much of the agreement as related to the valuation, and substituted the valuation by *D.*: 2., to the plea to the second count, that the straw, &c., was bargained and sold under the agreement in the first count mentioned; that afterwards defendant proposed &c. (as in first count), and plaintiff assented, and *D.* valued accordingly: by means of which plaintiff and defendant waived &c. (as in the replication to the plea to the first count).

Rejoinder, to replication 1., that the waiver and substitution were by word of mouth only. To replication 2, that the proposal and assent were by word of mouth only.

On general demurrer to the rejoinder: Held, that the original was an entire agreement relating to an interest in lands, and necessarily in writing; that, even if the parties could waive the whole verbally, they appeared by the record not to have done so; and that a part of it could not be verbally waived, even supposing that part to have been, if standing by itself, an agreement not required to be in writing.

2. The plea commenced by a general allegation that plaintiff ought not to have or maintain his aforesaid action thereof against defendant; then followed matter expressly confined to "the first count," with a verification and prayer of judgment whether the plaintiff ought to have or maintain "his aforesaid action thereof." The record then went on thus: "And as to the second count," &c., with matter expressly confined to "the second count," and verification and prayer of judgment, as before:

Held, that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer to the rejoinder.

remain

defendants of the other, the plaintiff agreed to grant unto the defendants, and they agreed to accept and take of the plaintiff, a lease of all that messuage, &c., with the lands, &c., then held by one *C.*, for a term which would expire at *Michaelmas* then next, at which time, or so soon after as the same should be obtained, defendants were to have and accept the possession of the said messuage, &c., and in such state and condition, and under such circumstances, as plaintiff should be bound to receive the same from *C.*, to hold to defendants, their executors, administrators, and assigns, for twenty-one years from &c., at the rent of 500*l.*: such lease to contain all common and usual covenants, and particularly &c. (for rent and repairs): and it was by the said agreement further mutually agreed that the straw, fodder, chaff, and colder, which, at the time of the said *C.* quitting possession on the termination of his term, should

remain upon the premises unconsumed by cattle, together with the dung, manure, and compost, made or brought upon the said premises, should be appraised and valued to the plaintiff by such competent persons on the respective behalves of the plaintiff and the defendants as they should respectively appoint, or their umpire, in the usual way; and the amount of such valuation should be then forthwith paid to the plaintiff by the defendants: and it was thereby further mutually agreed, &c. (as to shares of the expenses of the agreement, lease, &c., the lease and counterpart to be prepared by the solicitor for the plaintiff); and that, on the execution of the said intended lease by plaintiff, defendants thereby agreed to accept the same as aforesaid, and to execute a counterpart thereof: and, lastly, that, in default of performance of any or either of the agreements before mentioned, the person or persons so making default should forfeit and pay unto the other or others of them 300*l*. The count then stated that, the said agreement being so made, afterwards, to wit on &c., in consideration thereof, and that &c. (mutual promises to perform the said agreements): and that afterwards, and after the making of the said agreement and promise of the defendants, to wit, 29th *September* 1834, the said *C.* did quit the possession of the said premises, and his term terminated and expired; and that, at the time of the said *C.* so quitting possession, divers large quantities of straw, &c., remained upon the said premises unconsumed by cattle, together with divers large quantities of dung, &c., which had been made and brought upon the said premises: and that, under and by virtue of the said agreement, the defendants afterwards, to wit on &c., entered into and upon the said messuage, lands, &c.,
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and had and accepted the possession of the same, and became and were possessed thereof for the said term of twenty-one years, and continued so thereof possessed for a long space of time, to wit, from thence hitherto; and the defendants then also took possession of, and had and retained to their own use, the said straw, &c., dung, &c., so then being in and upon the said premises; that afterwards, to wit, on &c., defendants proposed to plaintiff that the said straw, &c., dung, &c., should be appraised and valued to plaintiff by one *D. C.*, on the respective behalves of plaintiff and defendants; and, plaintiff having assented to such proposal, the said straw, &c., dung, &c., were afterwards, to wit on &c., by and with the mutual consent and agreement of plaintiff and defendants, appraised and valued to plaintiff by the said *D. C.* at a large &c., to wit 239*l.* 7*s.*, whereof (notice to defendants); and, although the plaintiff hath always, from the time of making the said first-mentioned agreement hitherto, been ready and willing to grant the defendants such lease as in the said first-mentioned agreement is in that behalf mentioned, and to prepare such lease and a counterpart thereof by such solicitor of him the plaintiff as aforesaid, and hath always hitherto (performance of the first mentioned agreement by plaintiff), yet the defendants, not regarding &c., have not, nor hath either of them, as yet paid to the plaintiff the said 239*l.* 7*s.*, being the amount of the said appraisement and valuation, or any part thereof, although often requested &c.

Second count, *indebitatus assumpsit* for goods and chattels bargained and sold by plaintiff to defendants, and by defendants, under and by virtue of that bargain and sale, had and taken to their own use.

Plea.

Plea. And the defendants, by &c., say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the first-mentioned agreement, in the first count of the said declaration mentioned, between the plaintiff and the defendants, was in writing, and signed by the plaintiff and defendants respectively, and that the proposal in the declaration alleged to have been made by the defendants to the plaintiff, that is to say, that the said straw, &c., and the said dung, &c., should be appraised and valued to the plaintiff by *D. C.*, on the respective behalves of the plaintiff and defendants, and also the alleged assent by the plaintiff to such proposal, were, and such proposal and assent each of them was, by word of mouth only, and not in writing; and this they are ready to verify: wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And, as to the second count of the declaration, the said defendants say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the goods in the second count mentioned consisted of certain straw, &c., and certain dung, &c.; and that the said last-mentioned goods were bargained and sold by the plaintiff to the defendants under and by a certain agreement in writing made between the plaintiff and defendants, to wit, 6th *February* 1834, by which said last-mentioned agreement it was mutually agreed between the plaintiff and the defendants that the said last-mentioned goods should be appraised and valued to the plaintiff by such competent persons on the respective behalves of the plaintiff and defendants as they should respectively appoint, or the umpire of the

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said competent persons, in the usual way, and the amount of such valuation should be then forthwith paid to the plaintiff by the defendants: and the defendants further say that no such valuation or appraisement has hitherto been made, according to the terms of the said last-mentioned written agreement, but that the said last-mentioned goods were valued and appraised, to wit, on &c., at the sum in the second count of the declaration mentioned, by one person only, to wit, the said *D. C.*; and that the defendants have, since the making of the said last-mentioned agreement, always been ready and willing, and have offered and proposed to the plaintiff, to wit on &c., and on divers other days &c., that the last-mentioned goods should be valued and appraised to the plaintiff according to the terms of the last-mentioned agreement; but that the plaintiff has hitherto wholly refused and declined to agree to the said last-mentioned offer and proposal of the defendants: and this the defendants are ready to verify: wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action, thereof against them, &c.

Replication. As to the plea first pleaded, præcludi non, because he saith that, by means and in consequence of the proposal made by the defendants to the plaintiff, and the assent by the plaintiff to such proposal, as in the first count of the said declaration mentioned, and of the said straw, &c., and the said dung, &c., in that count mentioned, having been so appraised and valued by and with the mutual consent and agreement of the plaintiff and the defendants, as therein also mentioned, the plaintiff and the defendants did respectively waive and dispense with the performance of so much of the said first-mentioned agreement in the said first count mentioned as related

related to the mode of appraising and valuing the said last-mentioned straw, &c., and the said last-mentioned dung, &c., and substitute another and different mode of appraisement and valuation in lieu thereof, to wit, an appraisement and valuation by the said *D. C.*; and this &c. (Verification.)

And, as to the plea secondly pleaded, *præcludi non*, because he saith that the said goods in the said second count mentioned were bargained and sold by the plaintiff to the defendants under and by virtue of the first-mentioned agreement in the first count mentioned; and that, after the making of that agreement, to wit, 29th *September* 1834, the defendants proposed to the plaintiff that the said last-mentioned goods should be appraised and valued to the plaintiff by one person only, to wit, the said *D. C.*, on the respective behalves of the plaintiff and the defendants; and, the plaintiff having assented to such proposal, the said last-mentioned goods were afterwards, to wit on the day and year last aforesaid, by and with the mutual consent and agreement of the plaintiff and the defendants, appraised and valued at a certain sum, to wit the sum in the second count mentioned, by one person only, to wit the said *D. C.*; and, by means and in consequence of the said last-mentioned proposal and assent, and of the said last-mentioned goods having been so appraised and valued by and with the mutual consent and agreement of the plaintiff and the defendants, the plaintiff and the defendants did respectively waive and dispense with the performance of so much of the said first-mentioned agreement as related to the mode of appraising and valuing the said last-mentioned goods, and substitute another and different mode of appraisement and valuation in

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lieu thereof, to wit an appraisement and valuation by the said *D. C.* only: and this &c. (Verification).

Rejoinder. As to the replication to the first plea, that the alleged waiver and dispensation of the performance of so much of the said first-mentioned written agreement as related to the mode of appraising and valuing the said straw, &c., and the said dung, &c., and that the said alleged substitution of the said other and different appraisement and valuation in lieu thereof, in the replication mentioned, were, and such waiver, dispensation and substitution each of them was, by word of mouth only, and not in writing: and this &c. (Verification.)

As to the replication to the second plea, that the first-mentioned agreement in that replication mentioned was in writing, and signed by the plaintiff and defendants; and that the said proposal, in the last-mentioned replication alleged to have been made to the plaintiff, that the said goods in the said replication mentioned should be appraised and valued to the plaintiff by the said *D. C.*, on the respective behalves of the plaintiff and defendants, and also the alleged assent by the plaintiff to such alleged proposal in the last-mentioned replication mentioned, were, and such proposal and assent each of them was, by word of mouth only, and not in writing; and this &c. (Verification).

General demurrer, and joinder.

The case was argued in *Easter* term last (*a*).

Platt, for the plaintiff. First, the first plea is bad; for it commences as an answer to the whole declaration,

(*a*) May 3d. Before Lord Denman C. J., Littleale, Patteson, and Coleridge Js.

whereas

whereas it suggests an answer to the first count only ; it is therefore generally demurrable ; note (3) to *Earl of Manchester v. Vale* (a), *Thomas v. Heathorn* (b). There is therefore no good answer on the record to the first count.

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Secondly, the facts alleged furnish no answer to the declaration. Sect. 17. of the Statute of Frauds, 29 C. 2. c. 3., is inapplicable, because there has been an actual accepting and receiving. Again, the record shews that the original agreement has been substantially complied with. The valuation was to be made by such competent persons, on the behalves of the plaintiff and defendants, as they should respectively appoint. They have respectively appointed the same person. Even if this be not so, the parties by parol may waive or vary so much of the agreement as they jointly choose to dispense with. If there had originally been two agreements, instead of one agreement containing the two parts, one might have been adhered to, the other waived or varied. If, indeed, after the written agreement a new parol agreement had been adopted, and no part acceptance had taken place or earnest been given, perhaps the objection on the other side might have prevailed. Here there is a new agreement, executed by delivery and acceptance. [*Patteson J.* That you should have shewn in your pleadings : you claim by the old agreement.] The new agreement adopts the terms of the old one, except as to the mode of valuation : that is all which the record fairly implies.

E. V. Williams, contra. It is true that, if a plea assume to answer the whole declaration, and answer only a part, it is bad ; and perhaps the objection might

(a) 1 *Wms. Saund.* 28.(b) 2 *B. & C.* 477.

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be taken on general demurret. But here there is, at the utmost, no more than an informality, if indeed the plea be not strictly correct. There is but one plea on the record: that commences properly, as an answer to the whole declaration; and then it proceeds to answer each count separately. [*Littledale J.* You verify: then is not what follows a new plea?] Not necessarily so: the respective answers to each count require verification: it is not necessary to defer the verification of the answer to the first count to the end of the plea. Suppose the answer to the first count required a verification, and that to the second a conclusion to the country, or a demurrer; it would then be impossible to defer the verification to the end of the whole plea; yet that would not make two pleas. Before stat. 4 *Ann. c.* 16. s. 4. not more than one plea could be pleaded: yet the defendant was of course entitled to give separate answers to separate counts, with the appropriate conclusions. Since that statute, and before the rule *H. 4 W. 4., General Rules and Regulations*, 11 (a), such a plea as this might have been pleaded without leave of the Court; nor is a rule now required for such a plea. That which is called the second plea does not, even in form, profess to be "a further plea:" no part of the declaration is answered more than once. [*Littledale J.* In the first verification you pray judgment whether the plaintiff ought to maintain his judgment "thereof:" "thereof," where first used, means the whole declaration.] But the word, in the first verification, must be referred to that which more immediately precedes it; that is, to the first count: all the allegations after the

(a) 5 B. & Ad. v.

commencement, down to the first verification, so relate. At the utmost, the first verification is mere surplusage : and the Court will view this objection with the less favour, because the declaration, by adding the second count for goods bargained and sold, violates the new rules, *General Rules and Regulations*, 5. (a).

Secondly, this is a contract for an interest in or concerning lands within sect. 4. of the Statute of Frauds, 29 C. 2. c. 3. Then this is a verbal variation of a written contract under the statute ; and the action therefore fails, according to *Goss v. Lord Nugent* (b). It is true that the original contract might have been wholly abandoned by verbal agreement ; but, if a part of it remain uncanceled, nothing now can be incorporated without writing. Further, the part to which the variation applies is itself a substantial part of the contract relating to the interest in the land ; it affects the mode of occupying ; and therefore falls within sect. 4. of the Statute of Frauds, and the parol agreement touching the contract to be made in this respect is void, as in *Walters v. Morgan* (c). The contract is entire : the part as to the straw, &c., in fact constitutes a part of the consideration, and is therefore inseparable. It is said that both parties might name the same valuer, under the original contract : but that is not so ; two opinions were to be taken. It may be allowed that (except for the Statute of Frauds) a written contract may be verbally abandoned, and a new one substituted verbally : but then the parties must rely exclusively on the substituted verbal contract ; and the old written contract, though it may be resorted to as evidence if referred to in the new one, is not the

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(a) 5 B. & Ad. ii, iii.

(b) 5 B. & Ad. 58.

(c) 2 Cox, 369.

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against
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contract which binds them. In such a case, a plaintiff must declare exclusively on the new contract; that is not done here: both the declaration and the replication found the claim as upon the old contract, with a variation. [*Patteson J.* Your present argument goes beyond *Goss v. Lord Nugent (a)*]. It does so. [*Coleridge J.* Is not this substantially a declaration on the last contract? It alleges that after the taking there was a valuation on the substituted agreement, and complains of the non-payment under that valuation.] The promise to pay, as laid in the declaration, is anterior to the variation: no promise to pay on the substituted contract is averred. There is merely an excuse for the non-performance of the condition precedent.

Platt, in reply. In *Goss v. Lord Nugent (a)* the contract was wholly unexecuted; here all is executed, except that to which the variation applies. And that part does not, by itself, come within the Statute of Frauds: it might therefore be varied, or waived; *Cuff v. Penn (b)*, *Warren v. Stagg (c)*. [*Patteson J.* In *Earl of Falmouth v. Thomas (d)* the Court intimated that, where crops were taken under a contract for lands, not in writing, the value might perhaps have been recovered in indebitatus assumpsit for goods sold and delivered on a quantum meruit, but not as bargained and sold.] That was a case of crops growing on the land at the time of the bargain and sale. [*Lord Denman C. J.* The judgment of Lord *Lyndhurst* does not appear to proceed upon any ground which, in that respect, distinguishes the

(a) 5 B. & Ad. 58.

(b) 1 M. & S. 21.

(c) Cited in *Little v. Holland*, 3 T. R. 591.

(d) 1 C. & M. 109. S. C. 3 Tyrwh. 49.

case from the present.] It is said that the promise, the breach of which is complained of, was to perform the old agreement : but the words " said promise " do not necessarily refer to the mutual promise originally laid. The proposal of the new contract, and the assent, constitute the promise which the law will infer ; the averment of performance is mere surplusage ; it has been often so held in declarations on covenants. The new contract is therefore not within the Statute of Frauds : and *Goss v. Lord Nugent* (a) does not apply.

Cur. adv. vult.

In this term (*June* 6th), Lord DENMAN C. J. delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows :—

It was contended for the plaintiff that the first plea was bad, because it professed to be pleaded to the whole declaration, yet contained an answer only to part : but we think that it is plainly pleaded to the first count only, though in an informal manner, which might make it liable to a special demurrer. It is not however competent to the plaintiff to take this objection on a demurrer to the rejoinder.

The real question raised by the demurrer is, whether the waiver of the mode of valuation is binding, not being in writing.

The original agreement was in writing, and necessarily so, for it related to an interest in lands ; and, being an entire agreement, the whole was necessarily in writing ; *Chater v. Beckett* (b). Now, assuming that it was competent to the parties to waive and abandon

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against
GRAHAM.

(a) 5 B. & Ad. 58.

(b) 7 T. R. 201.

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the whole of the first agreement by a subsequent agreement not in writing (which is however doubted in *Goss v. Lord Nugent (a)*), yet here, as in that case, the parties have not waived and abandoned the whole; for it appears by the declaration that the lease is not yet granted; that the original agreement to grant it is still subsisting; and the plaintiff avers his readiness to grant it under that agreement. What has been done is a waiver and abandonment of part only; and, if that part had of itself required writing within the Statute of Frauds, the cases of *Goss v. Lord Nugent (a)* and *Earl of Falmouth v. Thomas (b)* are express authorities to shew that the waiver would not be binding. Here that part might have been good of itself without writing, by reason of the acceptance which is averred in the first count, though it may be otherwise as to the second count, which is for goods *bargained and sold*, not *sold and delivered*: and it is contended that, as it was competent to the parties to have made two contracts, in the first instance,—one in writing as to the lease, the other not in writing as to the straw, manure, &c.,—so it was competent to them afterwards, by agreement not in writing, to separate into two parts the subject matters of the original agreement, and to substitute a new agreement, not in writing, as to the straw, manure, &c. We think that is not so: but that the agreement, being entire in the first instance, must so continue, and that it cannot be separated or altered otherwise than by writing. If it could, it would follow that, should the present plaintiff hereafter refuse to execute the lease, the present defendants, in suing for such refusal, would be

(a) 5 B. & Ad. 58.

(b) 1 Cr. & M. 89. S. C. 3 Tyrwh. 26.

obliged

obliged to state the altered agreement as the consideration, and aver a readiness to perform it, and would have to prove their case partly by writing, and partly by oral evidence; the very predicament which the Statute of Frauds was intended to prevent.

It was attempted to be argued that the original agreement was performed, inasmuch as one person named by mutual consent might be considered as "competent persons" respectively appointed by the parties: but we think that this construction cannot reasonably be put on the words of the agreement: neither has the plaintiff attempted so to treat it; for he has, both in his first count, and in his replication to the second plea, expressly alleged a waiver of, and substitution for, and not a compliance with, the original agreement. The judgment must be for the defendants.

Judgment for defendants.

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Tuesday,
June 7th.ARMITAGE *against* RIGBYE and TUTE, Bail of
HAMER.

1. *A.* obtained judgment against *H.* of *Michaelmas* term, and sued out a ca. sa., which was returned, non est inventus, on 13th January. On 14th January, *H.* obtained a rule nisi for a new trial or nonsuit, and that proceedings should be stayed in the meanwhile; and he had given notice to *A.* of his intention to move for this rule, before the ca. sa. was sued out. The rule was discharged on 8th June.

On 9th June a sci. fa. against the bail was sued out: Held to be regular; and that no fresh entry of judgment, or alias ca. sa., was necessary.

2. Three of the days during which the sci. fa. lay at the office of the sheriff (of *Middlesex*) before the return, were *Whit Monday*, *Tuesday*, and *Wednesday*. It appeared by affidavit that these days were half-holidays at the office, the hours of general business being only from eleven to two; but that the sci. fa. book might be searched for the same time as on other days. Held, that these three days were to be counted as searching days.

3. The sci. fa. was returned nil, on 15th June. *R.*, one of the bail, had left the place where he formerly resided (in *Lancashire*), and which was described as his residence in the recognisance, and had quitted the realm. *A.*'s attorney knew that he had left his residence, but did not know whither he was gone. On 9th July a letter was sent by post to *R.*'s former residence, giving him notice of the proceedings, which was not returned from the Dead letter office. On 23d July *A.* obtained a Judge's order for signing judgment against the bail, which was signed accordingly, *R.* not having been summoned. The Court refused to set the judgment aside.

4. Held that, if *R.* had shewn any matter which, had he been summoned, he might have pleaded in bar to the sci. fa., he might have been allowed, on motion, to plead (though not to render), if the matters were not denied; or, if they were denied, he might have had *audita querela*.

following

following *Hilary* Term. On the 7th of *January* 1832, a writ of ca. sa. (tested 25th *November* 1831) was lodged in the office of the sheriff of *Middlesex*, returnable on the 13th, on which last day it was returned "non est inventus:" and it was taken away by the plaintiff from the office on 14th *January*. On the same 14th *January*, the motion for a new trial was made, and the Court granted a rule nisi for a nonsuit, or new trial, and for staying proceedings in the meanwhile. The plaintiff served notice of this rule on the defendant on the 18th of *January*. The rule was discharged on the 8th of *June* following. On the 9th of *June*, a writ of sci. fa. was lodged in the office of the sheriff of *Middlesex*, returnable on the 15th. On the 3d *July*, the plaintiff took the writ, returned nil, from the office, and judgment was entered up against both the bail on 24th *July* 1832; *Whit-Monday* was on the 11th *June* 1832; and it was sworn that *Whit-Monday* and the two following days were kept as holidays at the office, though, as a matter of civility to the profession, the office is open a part of such days. *Rigbye* had never been served with a copy of the writ of sci. fa., nor summoned thereon. He had formerly resided at *Harrock Hall*, in *Lancashire*, but had quitted this residence about *December* 1831, and had given up his establishment there, and gone to *Southampton*, where he resided eight months; and he afterwards went to the continent, and had resided at *Boulogne* since *August*, 1835, except that, towards the end of *October*, or beginning of *November* 1835, he had passed ten days in *London*. On his first arrival at *Boulogne*, he was visited by his attorney, who then for the first time informed him that proceedings had been instituted against him as bail, and judgment signed.

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 against
 RIGBYE.

On

1896.

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against
RIGBYE.

On affidavits of the above facts, *Manning*, in last *Easter* term (*April* 26th), obtained a rule calling on the plaintiff to shew cause why the judgment signed against *Rigbye* should not be set aside.

From the affidavits in answer to the rule it appeared that, immediately after the second trial in *December* 1891, the defendant had applied to Lord *Tenterden* to stay proceedings till the following term, in order to give the defendant an opportunity of moving for a new trial; that his Lordship had refused the application; and that the judgment against the bail was signed under an order of *Littledale J.*, dated 23d *July* 1892. It was also sworn that *Whit-Monday* and the *Tuesday* and *Wednesday* following were kept as half-holidays in the office of the sheriff of *Middlesex*; and that the hours for general business in the office on such half-holidays were from 11 in the morning to 2 in the afternoon, except that the scire facias book was open for the same period as on any other day, so that any person searching for proceedings against bail might, on application, have the same facilities for searching as on any other day. That, on the 9th of *July* 1892, a letter was sent by post, addressed to Mr. *Rigbye* at his seat in *Lancashire*, being the place of which he was described in the recognisance, giving him notice of the proceedings against him; that this letter had not been returned from the Dead letter office; and that, on the 10th, notice was personally served on the other bail. That the fact of *Rigbye* having left *Lancashire*, and gone abroad, before the 9th of *July*, was known to the plaintiff's attorney; but his address was not known. That, in *September* 1892, a letter was written by *Rigbye*, in which he spoke of hav-
ing

ing some time before received a notice that it was intended to proceed against him as bail of *Hamer*.

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against
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Cresswell shewed cause in last *Easter* term, *May* 9th (a). First, the ca. sa. was properly issued as of *Michaelmas* term, of which term judgment was entered up; and it was returned before the rule nisi for a new trial was obtained. That rule in itself suspended the proceedings, but it did not make what had been done null. Then the sci. fa. issued after the discharge of the rule; and it lay in the office a sufficient number of days; for, even supposing the books to be searchable only as a matter of favour on the half-holidays, the party is not the less bound to use the opportunity of searching. But it appears that, in fact, the regular practice is to allow the books to be searched. Then, by *R. H. 2. W. 4. I. 81. (b)*, judgment may be signed, by leave, after eight days from the return of one sci. fa. Here the sci. fa. was returnable on the 15th of *June*; and leave to sign judgment was obtained on the 23d of *July*, and judgment signed on the 24th: a second sci. fa. was not necessary. The defendant shews no grievance: a letter was sent to him before the leave to sign judgment was obtained, conformably to the decision in *Wimall v. Cook (c)*. His own affidavit goes no further than to negative his receiving notice from his own attorney; he may have had notice from others.

Sir *J. Campbell*, Attorney-General, and *Manning*, contrà. First, there should have been a judgment signed, or at any rate a fresh ca. sa. issued, after the discharge of the rule nisi. While that rule was pend-

(a) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(b) 3 B. & Ad. 386.

(c) 2 Dowl. P. C. 173.

ing,

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ing, the bail could not render the principal; and therefore their recognisance, properly speaking, was not broken. The bail are entitled to the power of rendering; and that without interruption. They were no party to the suspension: they had eight days to render after the return of the *capias*. [*Littledale J.* It is not necessary to wait eight days after the return of the *capias*, before suing out the *scire facias*]. The bail are not fixed till the eight days are expired. The *ca. sa.* is necessary for the purpose of informing the bail that the party means to proceed against the principal. Here the notice was suspended by the proceedings under the rule for a new trial; the bail were therefore entitled to be informed, on that suspension ceasing, that the plaintiff persevered in his intention; and for this purpose there should have been a second *ca. sa.* Next, the defendant should have had actual notice of the proceedings against him, that being now substituted for the constructive notice formerly implied from the two returns of nil. Here there is no assertion of notice before the letter of *July 9th*. The object of notice is, not to inform the bail that they are fixed, but to warn them, that they may not be fixed. As to the three holidays, the bail are entitled to the full number of searching days, as a matter of right; and it is not enough that the officers allow them to search on days when they have the power to refuse.

Cur. adv. vult.

LORD DENMAN, C. J., in this term, (*June 7th*), delivered the judgment of the Court. After stating the facts of the case, his lordship proceeded as follows:—

Three objections were taken.

1st. That the *scire facias* was issued too soon, inasmuch

much as all proceedings were suspended pending the rule nisi for a new trial, and no *capias ad satisfaciendum* was issued after that rule was disposed of. The answer is, that a *capias*, issued in January, was returned non est inventus before that rule was obtained, by which return the bail were fixed, any subsequent render being *ex gratia*, and not *ex debito justitiæ*, and the plaintiff being entitled in all cases to sue out a *scire facias* on the return-day of the *capias*. As he had not sued out the *scire facias* when the rule nisi for a new trial was obtained, although he might have done so the day before, his right was no doubt suspended pending that rule; but, on the discharge of that rule, it was immediately revived.

2dly, It was objected, that some of the days, during which the *scire facias* lay in the office, were half-holidays, and therefore ought not to be counted. The answer is, that, by the affidavits, it appears that the sheriff's office is open on those days for the purpose of searching for writs of *scire facias* in the same manner as on all other days in the year.

3dly, It was objected, that *Rigbye* was not summoned on the *scire facias*, nor was any notice sent to him before the return of the writ. As to his not being summoned; he could not be, for he was not in the county of *Middlesex*. As to the want of notice; in the first place, no notice is required by the rule of Court, which simply directs that judgment may be signed by leave of a Judge at any time after eight days from the return of one *scire facias*, although the bail be not summoned. The rule does not point at any circumstances by which the Judge is to be guided in granting that leave, except that it cannot be till eight days after the return. Before

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that rule, the bail might render *ex gratiâ* at any time before the rising of the Court on the return-day of the *second* scire facias, but not after; and those eight days are substituted for the second scire facias by analogy to the eight days after the return of the writ, which are allowed for that purpose *ex gratiâ*, where the plaintiff proceeds by action of debt on the recognisance. In practice, the Judges, before they grant leave to sign judgment, have required proof that notice has been sent to the bail, if their residence be known, or, if it be not, that proper attempts have been made to ascertain it. But this is entirely discretionary with the Judge. In the next place, notice was sent, and probably reached Mr. *Rigbye* before judgment was signed: or, if it did not, he has no one to blame but himself; for he left the country of his own accord, and should have instructed some person to watch the proceedings and render the original defendant. If Mr. *Rigbye* had shewn by his affidavits any matters which he might have pleaded in bar to the scire facias, and which he has lost the opportunity of pleading by not being summoned, and those matters had not been denied, the Court might now relieve him, on motion, and allow him to plead to the scire facias, although not to render the principal; or, if those matters had been denied, the Court would refuse to interfere, and he would have his remedy by *auditâ querelâ*: but no matters of that kind are suggested. He seeks to set aside the judgment, as irregular; but, for the reasons already stated, we think that he has failed in shewing any irregularity, and that this rule must be discharged, with costs.

Rule discharged, with costs.

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ASSUMPSIT. The declaration contained two counts: the first, for non-performance of an agreement; the second, on an account stated.

Pleas. First, as to the last count, non assumpsit. Second, as to the first count, that the agreement was obtained by fraud, covin, and misrepresentation. Third, as to the first count, that the agreement was not under seal, with some further allegations not material here.

The plaintiff joined issue on the first plea, traversed the second, and demurred to the third.

Afterwards the plaintiff made up and delivered the issue, with notice of trial of the issues in fact for the assizes at *Dolgelly*, in *July* 1834. The defendant obtained a summons to postpone the trial till after the argument of the demurrer; but, on cause being shewn before *Patteson J.*, the learned Judge refused to make any order. The trial took place at *Dolgelly*, in *July* 1834, before *Vaughan J.* The plaintiff offered no evidence on the first issue, and on that a verdict was entered for the defendant; but the plaintiff obtained a verdict on the issue joined on the plea of fraud, for 200*l.* damages, costs 40*s.* Afterwards, in *Hilary* term 1835, the demurrer was argued; and, in the same term, judgment was given for the defendant (a).

To a declaration in two counts, defendant pleaded two pleas to the first count, and one to the second. Issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to. The plaintiff took the issues of fact to trial, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed; and for the defendant on the issue on the second count. Afterwards, on the demurrer to the other plea to the first count, the defendant had judgment.

Held, that the plaintiff was entitled to all the costs of the trial on the

issue on which he had succeeded, including (in addition to the pleadings) briefs, witnesses, &c.

And that no objection arose from his having tried the issues in fact before that in law, especially as a Judge at chambers had refused an application by the defendant to order the trial of the issues in fact to be postponed till judgment was given on the demurrer.

(a) See the argument and judgment, *Bird v. Higginson*, 2 A. & E. 696.

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On the taxation of costs, the defendant contended that the plaintiff ought not to have gone to trial before the issue in law was determined; that the whole declaration had been virtually answered by the plea demurred to; and that the finding for the plaintiff on the fraud therefore became a nullity. Damages having been found for the plaintiff as above stated, and inserted in the *postea*, the Master, in order to raise the question as to the plaintiff's right to try the issue joined on the plea of fraud before the argument on the demurrer, allowed him, by way of increase, the general costs of the cause in the usual manner, deducting the defendant's costs of the other pleadings, the argument, &c. He, however, suggested in his report that so much of the *postea* as gave damages and costs to the plaintiff should, at all events, be struck out; in which case the plaintiff's costs, he suggested, would be limited to those of and occasioned by the second plea, but would include the costs of the trial (unless the Court should be of opinion that the plaintiff had no right to take the record down to trial before the argument on the demurrer); and, consequently, that the defendant should have the general costs of the cause in respect of the residue of the case, including, of course, the costs of the demurrer and argument.

In *Hilary* term last, Sir John Campbell, Attorney-General, obtained a rule to shew cause why the Master should not review his taxation by striking out all the costs allowed to the plaintiff, and taxing the defendant his full costs of the third plea, including the costs of arguing the demurrer thereto; and why he should not strike out of his *allocatur* on the *postea* the damages of 200*l.* marked by him for the plaintiff.

John

John Jervis shewed cause in *Hilary* term last (*a*). Damages having been found for the plaintiff, and inserted in the postea, the Master was obliged to allow him, in addition to the costs of the trial on the issue upon the plea of fraud, the general costs of the cause, amounting to about 5*l.*; and he cannot be deprived of those costs until the damages have been struck out as suggested. He is, at all events, entitled to the costs of the trial on the second issue. In *Cooke v. Sayer* (*b*) the defendant pleaded two pleas, each to the whole of the action; issue was joined on one, and the other was demurred to: first, the issue in fact was tried and found for the plaintiff; afterwards the demurrer was argued, and judgment given for the defendant; and the Court allowed the defendant the costs of the demurrer, but allowed no costs on either side as to the trial. But now, according to the rules *H. 2 W. 4. I. 74. (c)*, and *H. 4 W. 4., General Rules and Regulations, 7. (d)*, each party is to have the costs of the issue on which he succeeds. This was ruled in *Hart v. Cutbush* (*e*); where it was also held that the costs to which the plaintiff was entitled included, not only those of the pleadings on the issues on which he had succeeded, but of the witnesses on these issues, and all the costs of the trial relating to them.

Sir *John Campbell*, Attorney-General, *contra*. It was not intended by the new rules to alter the practice in this respect. It now appears that the plaintiff went unnecessarily to trial on the second issue; and he can-

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(*a*) *January 30th. Before Lord Denman C. J., Littledale, Williams, and Coleridge Js.*

(*b*) 3 *Burr.* 753. *S. C. 2 Wils.* 85.

(*c*) 3 *B. & Ad.* 385.

(*d*) 5 *B. & Ad.* iv, v.

(*e*) 2 *Dowl. P. C.* 456.

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not call upon the defendant to pay the expenses of his doing so. If the business of the Court had been less, the demurrer would have been first heard, and would have disposed of the whole question. By stat. 4 *Ann*, c. 16. s. 5. the costs are in the discretion of the Court. *Cross v. Johnson* (a) is an authority for the defendant. The rules of *H. 2 W. 4.*, and *H. 4 W. 4.*, which have been cited, apply only to cases where all the issues are of fact, and where there must of necessity be a trial. The rule *H. 2 W. 4. I. 74. (b)* only takes away costs from the plaintiff on the issues on which he fails, and gives costs to the defendant of all issues found for him: the defendant certainly has not had the second issue found for him, and does not claim costs on that; but there is nothing in that rule, or in the rule *H. 4 W. 4.*, *General Rules and Regulations*, 7. (c), requiring him to pay them to the plaintiff. The practice, where there are issues in law and fact, is left on its old footing; the present case is entirely omitted. In *Goodburne v. Bowman* (d) it was held that, where a defendant succeeds on issues in fact, but judgment is afterwards given non obstante veredicto, neither party has the costs of the issues.

Cur. adv. vult.

In this term (June 13th) Lord DENMAN C. J. delivered the judgment of the Court. After stating the facts, from the Master's report, his Lordship proceeded as follows:—

The case of *Cooke v. Sayer*, reported in *Burrow* (e), and more shortly in *Wilson* (g), which has been referred

(a) 9 B. & C. 613.

(c) 5 B. & Ad. iv, v.

(e) 2 Burr. 753.

(b) 3 B. & Ad. 385.

(d) 2 Dowl. P. C. 206.

(g) 2 Wils. 85.

to in the Master's report, and also upon the argument, is almost exactly the same as the present case. It was an action for criminal conversation. The defendant pleaded, 1st, Not Guilty; 2dly, Not Guilty within six years. On the first plea, the plaintiff joined issue, and obtained a verdict for 50*l*. To the second plea there was a demurrer, and judgment for the defendant on the demurrer; so that, upon the whole record, it appeared that the plaintiff had no cause of action. The issue was tried there, as it was here, before the argument on the demurrer. The question of costs was much considered by the Court of King's Bench; and they determined that the defendant was entitled to the costs of the demurrer; but, as to the costs of the plaintiff, that he should not have the costs of the trial, because he could have no judgment for the damages he had recovered; and they held that each party must pay his own costs of the trial.

That case, if rightly decided, would govern the present; but it must be observed that in *Yates v. Gun* (a), some years before *Cooke v. Sayer* (a), the Court of Common Pleas, under circumstances nearly similar to *Cooke v. Sayer* (b), had come to quite a contrary decision. In that case, also, as in the present, the issue was tried before the argument on the demurrer; and they allowed the plaintiff the costs of the trial, to be set off against the costs of the defendant. It becomes therefore proper to consider whether *Cooke v. Sayer* (b) be rightly decided.

The reason given by the Court of King's Bench, in *Cooke v. Sayer* (b), is perfectly correct, if we look into

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(a) *Barnes*, 141.(b) 2 *Burr.* 753. *S. C.* 2 *Wils.* 85.

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the statute of *Gloucester* (a), on which they decided the case; for that statute only gives costs where damages are recovered; and, as the damages given in this case were only contingently assessed, the plaintiff, as far as the statute of *Gloucester* goes, would not be entitled to the costs of the trial. But the Court, though they refer to the statute of 4 *Anne*, c. 16., as to pleading double, do not seem to have adverted to the 5th section, which provides "That if any such matter shall upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the Judge, who tried the said issue, shall certify, that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him."

Several cases have been decided, where there have been issues on double pleadings under the statute of *Anne*, and where the defendants succeeded on the trial of issues which would entitle them to judgment on the whole record, but where, nevertheless, the plaintiff, who has succeeded on some of the issues, has been held entitled to the costs of those issues.

In *Jones v. Davies* (b), in an action of assault and battery, the defendants pleaded four pleas; and, on the trial, two were found for the plaintiff without damages, and the other two for the defendants, and no certificate from the Judge that the defendants had probable cause to plead those pleas which were found for the plaintiff. The Court held that the plaintiff was entitled to have

(a) Stat. 6 *Edw.* 1. c. 1. s. 2.(b) *Barnes*, 140.

the costs of the pleas allowed to him, and that they should be deducted out of the defendant's costs.

In a case mentioned in *Buller's Nisi Prius*, in trespass, the defendant pleaded Not Guilty, and several justifications. Upon the trial, the plaintiff not proving his possession of the locus in quo, the defendant had a verdict: and, by direction of *Denison J.*, the verdict was entered upon the general issue: upon which there was a motion for a venire de novo: but the Court refused the motion, saying the verdict was complete and determined the cause; that the plaintiff was not entitled to damages, though they said the plaintiff might have insisted to have a verdict entered on the other issues for the sake of costs, which he would be entitled to, unless the Judge certified that the defendant had probable cause to plead such plea: *Bartlet v. Spooner*, *E.* 1751. C. B. (a); *S. P. Dayrel v. Briggs*, *Tr.* 25 G. 2. K. B. (b). The case of *Bartlet v. Spooner* is also to be found in *Barnes* (c), with some variations, but not material.

In *Duberley v. Page* (d), in an action of trespass, the defendants pleaded Not Guilty, and several justifications. To the replication on one of the defendants' pleas there was a demurrer, on which the plaintiff had judgment. On the trial, the issues were found for the defendants, except as to some on which the jury were discharged from giving a verdict. The question of costs was very fully argued; and the Court held that the plaintiff was entitled to the costs of the demurrer, though the defendants had judgment upon the whole record.

So also in *Benett v. Coster* (e), where, in trespass, the

(a) *Bul. N. P.* 335.

(c) *Barnes*, 461.

(e) 1 B. & B. 465.

(b) *Bul. N. P.* 335.

(d) 2 T. R. 391.

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defendant pleaded pleas which were found for him, and entitled him to judgment on the whole record, but several issues were found for the plaintiff, the plaintiff had his costs allowed on those issues.

In *Hart v. Cutbush (a)*, which was an action for a libel, the defendant pleaded the general issue, and several pleas of justification. On the trial, the jury found a verdict for the defendant on the general issue, and no evidence was given on either side as to the pleas of justification. The Master allowed the plaintiff his costs of the pleadings on the pleas of justification, and of the witnesses who were there to support them. An application was made for the Master to review his taxation, on the ground that, as the defendant had pleaded a plea that went to the whole cause of action, he was entitled to the costs of the cause, and the plaintiff to none; and it was contended that, as there was no evidence given on the pleas of justification, there could be no certificate under the statute 4 *Ann. c. 16. s. 5*. But *Parke J.* held that the plaintiff was entitled to the costs on those issues.

These cases shew that the construction and practice on the statute of *Anne* has been to give the plaintiff his costs on the issues found for him, whether they be issues of fact or issues of law, even though, upon the other issues, the judgment be such as that the defendant has judgment on the whole record.

There are other cases, of *Howard v. Cheshire (b)*, and *Richmond v. Johnson (c)*, where questions have arisen under the statute of *Anne*, with no certificate, under the statute of *Anne*, that there was probable

(a) 2 Dowl. P. C. 456.

(b) *Sayer's Rep.* 260.(c) 7 *East*, 583.

cause to plead the several matters, and where there has been a certificate under the statute 43 *Eliz. c. 6. s. 2.* to deprive the plaintiff of costs; and where the conjoined operation of those statutes has been under consideration; but it is not necessary to notice the facts of these cases, as it was held that the statute of *Anne* does not apply unless one of the special pleas be found for the defendant.

Several cases have occurred as to the statute of *Anne*, in replevin, *Bright v. Jackson* (a), *Dodd v. Joddrell* (b), *Stone v. Forsyth* (c), in which it was held that the avowant was entitled to the costs of the issues, on double pleadings, on which he succeeded, unless there was a Judge's certificate that there was probable cause to plead the double pleas.

The case of *Vivian v. Blake* (d) has been considered as a contrary authority. It was an action of trespass, to which the defendants pleaded the general issue and justifications. The verdict was for the plaintiff on the general issue, with 1s. damages, and for the defendants on the pleas of justification. The plaintiff applied to have his costs taxed: the Court, upon consideration, said that the pleas of justification extended to the whole trespass; it appeared that the finding was for the defendant upon the whole record, and therefore the plaintiff was not entitled to the costs. The case is quite correct, if the decision is meant to be that the plaintiff was not entitled to the whole costs of the cause; for, as to that, there is not the slightest pretence; and we cannot intend from the report that there was anything in question but the general costs of the cause: but, if

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(a) *Barnes*, 144, 146.(b) 2 *T. R.* 235.(c) 2 *Doug.* 709. note [2].(d) 11 *East*, 263.

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the application had been confined to the costs of the issue on the plea of Not Guilty, which was found for him, then we think, upon principle and previously decided cases, he would be entitled to that limited extent. The case, therefore, as now presented in the report, does not seem to lead to any definite conclusion.

Then, if the plaintiff be entitled to the costs of the issue, the next question is to what those costs extend.

In the case of *Brooke v. Willet (a)*, which was in replevin, the defendant was held entitled to have his costs allowed of the trial of the whole issue which was found for him, and not of the pleadings alone. And so in *Vollum v. Simpson (b)*, which was also in replevin, some of the issues were found for the plaintiff, and some for the defendant; and it was held that the plaintiff was entitled to the costs of so much of the pleadings, briefs, and witnesses, as related to the issues upon which he had succeeded; and so also the defendant as to the issues found for him.

We have noticed the two last cases, as being in replevin, because in *Othir v. Calvert (c)*, which was in trespass, and where the question was whether the plaintiff, who had succeeded on some of the issues, should be confined to having the costs of the pleadings only, the prothonotaries differed in opinion; one thinking that he should have the costs of the trial occasioned by these issues, and the other prothonotary thinking that he was entitled to the costs of the pleadings only, though he admitted that, in replevin, the practice was different. The Court took time to consider; and, afterwards, *Park J.* said that he had spoken to nearly

(a) 2 H. Bl. 435.

(b) 2 Bos. & Pull. 368.

(c) 1 Bing. 275.; S. C. 8 B. Moore, 289.

all the judges on the subject, who were all most clearly of opinion that the costs of the issues, in that case, included only the costs of pleadings on those issues. And it is to be observed that, in the case of *Page v. Creed* (a), the Court said that the statute of *Anne* only gave the costs of the pleadings. The case, however, in other respects, differed from that now before the Court; and we only quote it for the language used by the Court.

But, in the late case of *Hart v. Cutbush* (b), which we have before noticed, one question was, whether the plaintiff, who had succeeded on some of the pleas, was entitled to the costs of the witnesses as well as the costs of the pleadings. *Parke J.* said that the matter was very much considered by the Court in the case of *The Duke of Newcastle v. Green* (c). "There the defendant put no less than thirty-five special pleas on the record, besides the general issue. The general issue was found for the defendant, and the duke had a verdict on all the special pleas. There it was held that the duke was entitled to the costs of the pleadings, and of the witnesses in support of them. His costs exceeded those of the defendant. As to the costs of the pleading and the costs of the witnesses being distinguished, there can be no reason for so doing. If the plaintiff is entitled to the costs of the pleadings, why should he not be entitled to the costs of the witnesses in support of them? The necessity of bringing them is caused by the manner in which the defendant pleads." And he refused a rule to shew cause why the Master should not review his taxation of costs. This point was also expressly so decided by this Court, after taking time to

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(a) 3 T. R. 391.

(b) 2 Dowl. P. C. 456.

(c) Not reported. See *Spencer v. Hamerton*, 4 A. & E. 418.

consider,

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consider, and upon a review of the cases now cited, in *Spencer v. Hamerton* (a), which was argued in *Trinity* term last, and judgment given in *Hilary* term last.

We entirely concur in the view which *Parke J.* took of the subject in *Hart v. Cutbush* (b): and then, if the plaintiff is to go beyond the costs of the pleadings, he is entitled, besides the costs of the witnesses, to the costs of the nisi prius record and jury, briefs, counsel's fees, and all other expenses incidental to the trial, because all these expenses are necessarily incurred for the determination of the issue; and we may observe that, in the case of *Yates v. Gun* (c), noticed in the early part of this judgment, the plaintiff was allowed the costs of the trial.

But then another objection is made to the plaintiff being allowed his costs, that he should not have taken down the issue to be tried till after the argument on the demurrer. But, as to that, it is quite clear that a party may either go to trial or argue a demurrer first just as he thinks fit; and it is so stated by *Buller J.* in *Duberley v. Page* (d), before referred to; though he says he always thought it better to argue a demurrer before trial, because a demurrer may put an end to the whole. But, in the present case, if there was any doubt on that point, it is put an end to, because my brother *Patteson* refused to make an order to postpone the trial of the cause till after the argument of the demurrer.

On the whole of this case, we are of opinion that the rule for the Master to review his taxation of costs must be discharged.

Rule discharged.

(a) 4 A. & E. 413.

(b) 2 Dowl. P. C. 456.

(c) *Barnes*, 141.

(d) 2 T. R. 394.

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DOE on the Demise of GEORGE LINSEY, against
SARAH EDWARDS, WILLIAM THETFORD, JOHN
CHAMBERLIN, and JOSEPH GOOSE. Monday,
June 13th.

EJECTMENT for premises in *Frowse Newton, Norfolk*. The action was commenced in *Hilary* term, 1833. On the trial before *Gaselee J.*, at the *Norfolk* Summer Assizes, 1835, it appeared that the premises were certain copyhold lands, consisting of two parts, one called the *Staithe*, with some additional land, the other called the *Folly Close*, with some additional land. On the 26th of *November* 1801, according to the evidence given for the plaintiff, one *Daniel Bloom* was tenant of the *Staithe* and the *Folly Close*, and *Thomas Edwards*, the husband of the defendant *Sarah Edwards*, held the *Staithe* as under-tenant to *Bloom*. On that day, *Daniel Bloom* signed the paper hereafter mentioned, adding the word "tenant" to his signature; and *Thomas Edwards* and three other persons also signed it, below *Bloom's* name, adding to their signatures the words "under-tenants to d°." Two other persons also signed their names, adding each the word "tenant" to their signatures.

"We, whose names are hereunto set, being tenants and under-tenants in possession of an estate and premises within that part of the parish of *Frowse Newton* which

E., being in occupation of land, signed an instrument, whereby he recited that he was tenant of the land; that *L.* claimed the fee, and had entered in the name of taking possession; that *E.* did thereby attorn to *L.*, and become tenant to him from the preceding *Michaelmas* for such part as was in his occupation, at the rent under which *E.* now occupied, and that he had that day paid *L.* a shilling in part of his rent: Held, that this was an attornment, but not an agreement requiring a stamp, though no title was shewn aliunde in *L.*

¹ Held also, that it was evidence of *L.*'s ownership at the time of the attornment, against future occupiers, though such occupiers did not claim through *E.*

The land was copyhold. After the attornment, *L.* was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with proper formalities in the copyhold court, within the twenty years following. Held that *L.* (before stat. 3 & 4 *W. 4. c. 27.*) was absolutely barred from bringing ejectment at the end of the twenty years, though *E.* continued in occupation till within twenty years of the ejectment being brought.

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is situate in the county of *Norfolk*, formerly the estate of *Ellis Braham* of" &c., "and late of *Frances Blyford* of" &c., "widow, deceased (to which said estate and premises *George Linsey* of" &c. "now claims to be entitled, as the lawful heir and owner thereof, and, as such owner and heir, hath on this day made a formal entry thereon, in the name of taking possession thereof), do hereby severally attorn and become tenants and under-tenants to the said *George Linsey*, from old *Michaelmas* day last past, of and for such part and parts of the said estate and premises as is and are in our respective occupations, at and under the several yearly rent and rents now paid by us, and under which we now hire and occupy the same; and we have this day severally paid unto the said *George Linsey* the sum of one shilling a-piece, in part of our said respective rents. Witness our hands this 26th day of *November* 1801." The paper was not stamped. The counsel for the defendants objected to the reception of this evidence, on the grounds, first, that the instrument required a stamp, secondly, that it was not evidence against all the defendants, nor even against *Sarah Edwards*, without proof that she claimed through *Thomas Edwards*. The learned Judge received the evidence, reserving leave to move to enter a nonsuit.

It was not shewn that *George Linsey*, the lessor of the plaintiff, had occupied, received rent, or in any way interfered with the property since the attornment.

It further appeared that *Ellis Braham*, being seised in fee of the premises in question, which were copyhold, by his will dated 7th *April* 1739, and by a codicil thereto dated 10th *April* 1739, devised all his messuages, lands, tenements, and hereditaments whatever, in *Frowse Newton*,

Newton, &c., to *Frances* his wife, for life, remainder to *Frances Blyford* his daughter, for life (a), remainder to "the issue of the body of *Frances* my daughter begotten or to be begotten, to be equally divided among them, and, for want of such issue," to *Thomas Linsey* in fee. *George Linsey*, the lessor of the plaintiff, was heir at law of *Thomas Linsey*. *Ellis Braham* died seized, and *Frances* his widow entered and held for her life. *Thomas Linsey* died after *Ellis Braham*, but before *Frances Braham*. After the death of *Frances* the widow, *Frances* the daughter, then the wife of *John Blyford*, being duly admitted, surrendered, on the 5th February 1773, to *John Chambers* in fee, to the intent that a common recovery might be suffered; and *Chambers* was admitted, and a common recovery suffered accordingly; and, on the day last mentioned, the demandant surrendered to the use of *Frances Blyford* in fee; and *Frances Blyford*, on the same day, surrendered to the use of her will. On the 8th of September 1795, *Frances Blyford* surrendered, to the intent that the lord should regrant to her own use for life, remainder to *Dixon Gamble* in fee; and she was admitted on such regrant accordingly. *Frances Blyford* died before the 26th November 1801, the date of the attornment; and *Dixon Gamble* died before 2d April 1802.

On the said 2d April 1802, *John Gamble*, the heir at law of *Dixon Gamble*, was admitted to hold in fee.

On the 18th of September 1802, *John Gamble* sold the part of the property containing the *Folly Close* to *Thomas Edwards* the husband of the defendant *Sarah Edwards*; and *Thomas Edwards* was admitted on 4th

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(a) There were intermediate remainders, which are omitted here, as they did not bear upon the point on which the Court decided the case.

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November 1802. On the same day *Thomas and Sarah Edwards* surrendered the *Folly Close* to *John Robinson*, to secure 180*l.* and interest. On the 7th *November 1814*, *Thomas and Sarah Edwards* surrendered the *Folly Close* to *Sarah Chamberlin* and *Elizabeth Barnes*, in consideration of an annuity to be paid to them during their lives. The annuity was not paid; and *Thomas Edwards* died about 1829, in possession, and the defendant *Sarah Edwards* had held the *Folly Close* until the time of the action.

The remainder of the property, comprehending the *Staithe*, was surrendered by *John Gamble*, on the 31st of *October 1806*, to *William Watts* in fee. On the 3d of *March 1807*, *William Watts* and his wife surrendered to *Jonathan Stocking* in fee. On the 23d of *April 1813*, *Jonathan Stocking* surrendered to *Sarah Edwards* in fee, and she was admitted accordingly. *Thomas Edwards* did not appear to have been out of the occupation since the attornment; and he and his wife occupied up to his death, and the wife occupied thenceforth up to the time of the action; she and her husband having, at some time between the last mentioned surrender and the death of the husband, surrendered to the use of her will.

On this evidence, the counsel for the defendant contended that the lessor of the plaintiff was barred by an adverse possession of more than twenty years, and by an adverse title deduced from *Ellis Braham*. The learned judge directed a nonsuit, giving leave to move to enter a verdict for the plaintiff. In *Michaelmas* term last, *Kelly* obtained a rule accordingly.

B. Andrews

B. Andrews and *Austin* shewed cause in *Easter* term last (*April 25th*) (*a*). First, the attornment was not evidence against the present defendants. No one is shewn to be connected in estate with any one of the parties attorning. *Sarah Edwards* is the widow of *Thomas Edwards*, who attorns as under-tenant; but she holds the part in which the *Staithe* is comprehended, not through her husband, but through the conveyance from *Stocking*. And, as to the part comprehending the *Folly Close*, *Thomas Edwards* was not connected with it till after the attornment. Secondly, the attornment should have been stamped. Unless title be shewn in the lessor of the plaintiff, independently of the attornment, the instrument which is called an attornment must operate, if at all, by way of creating a new tenancy altogether. In *Cornish v. Searell* (*b*) an instrument which professed to be an attornment, but which was in fact an agreement to create a fresh tenancy, was held to require an agreement stamp. Thirdly, supposing that this instrument could be received as an attornment simply, and as evidence against all the defendants, the lessor of the plaintiff is not entitled to recover. Nothing appears to have been done under it: the lessor has neither occupied himself, nor received the rents and profits. The attornment, even as against the parties attorning, is not conclusive evidence of the title of the party to whom the attornment is made, and may be rebutted; *Gravenor v. Woodhouse* (*c*). Here, the property has been dealt with, during the time between the attornment and the action, by parties whose rights are inconsistent with that of the lessor of the plaintiff. *Sarah Edwards* might

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(a) Before Lord Denman C. J., Littledale, Patteson, and Coleridge J.

(b) 8 B. & C. 471.

(c) 1 Bing. 38.

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have made a title, as lessor in ejectment, to the *Staithe*, by shewing the conveyance from *Stocking*, and deducing his title from *John Gamble*. [*Coleridge J.* You must go the length of shewing that there was nothing from which a jury could infer a possession by the lessor of the plaintiff within the twenty years.] Fourthly, the defendants are entitled to insist on the will, if it gave *Frances Blyford* an estate tail; for they may at least explain the attornment by shewing that it arose from mistake; *Gregory v. Doidge (a)*. The lessor claimed as the heir to the remainder-man: but the remainder is barred by the recovery, if *Frances Blyford* took an estate tail. (They then proceeded to argue that *Frances Blyford* took an estate tail under the will; but, the judgment of the Court having proceeded on another point, this part of the argument is omitted.)

Kelly and Manning contra. It is true that an attornment does not bind, where it is brought about by fraud or misrepresentation. It is not pretended here that these circumstances existed; and, if they had been asserted, the question would have been for the jury. In the absence of these, the attornment binds the party making it, and all claiming under him. The recital in the instrument of attornment is as strong as any that could be framed. The declarations of a deceased occupier, that he was tenant to another, are evidence of the title of that other, *Peaceable dem. Uncle v. Watson (b)*. As to the *Staithe*, it is clear that *Thomas Edwards* occupied it at the time of the attornment; and he, therefore, by the attornment, became tenant to the lessor of the plaintiff. The wife's purchase, without the landlord's privity, of a

(a) 3 Bing. 474.

(b) 4 Taunt. 16.

supposed fee-simple, from a third party claiming the reversion, could not make the husband's possession adverse. Therefore, there was no adverse possession up to the death of *Thomas Edwards*, which took place within twenty years of the commencement of the action. The acts of other parties could not disturb the possession which the lessor of the plaintiff had by means of his tenant, unless they were known to him, or were acts of positive occupation. But the proceedings in copyhold courts are not of this nature. Then, as to the *Folly Close*, *Bloom* attorned while he was in occupation: the same argument, therefore, still applies. In the case of each part, the utmost that can be said to have been proved against the plaintiff was a case upon which the jury might, if they thought fit, find a possession adverse to that of the lessor of the plaintiff. But this rule must be made absolute, if it was legally possible for the jury to find in favour of the plaintiff. The non-receipt of rent cannot show an adverse possession, as a necessary legal result: at the utmost it is only evidence for a jury. The statute of limitations does create a positive bar; but the mere non-payment of a quit rent is not, in itself, a circumstance from which adverse possession can be presumed; *Eldridge v. Knott* (a). [*Littledale J.* In avowry or cognisance for rent no seisin can be alleged above forty or fifty years (according to different readings of the statute (b)) before making the avowry or cognisance: but, in ejectment, the limitation is twenty years, under st. 21. J. 1. c. 16. s. 1.]. But, where rent has been paid in acknowledg-

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(a) 1 *Covp.* 214.

(b) 32 H. 8. c. 2. s. 4. See note (X.) to *Bevil's Case*, 4 *Rep.* 10 a. in *Thomas and Fraser's* edition.

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ment of the tenancy, by the party in possession, no lapse of time can make his possession adverse. Therefore, as the non-payment is not a legal bar, it is only evidence; and consequently the nonsuit was wrong. [*Coleridge J.* If *Thomas Edwards* was tenant in 1801, how is his tenancy determined now?] The admittance and surrender in *November* 1802, amount to a disclaimer. [*Lord Denman C. J.* 'That was more than twenty years before this action.] But it cannot be set up against the lessor of the plaintiff, unless he knew of it. Besides, there have been disclaimers since: the landlord may avail himself of any of these: he need not insist on the first. Then, as to the will, even if the defendants be entitled to insist upon it, *Frances Blyford* took only a life estate. (The arguments on this point are omitted.)

Cur. adv. vult.

LORD DENMAN C. J., in this term (*June 13th*), delivered the judgment of the Court.

This was a rule for setting aside a nonsuit, which had been directed at the assizes after hearing all the evidence on both sides; in shewing cause against which several points were relied on.

The lessor of the plaintiff, who was taken through the trial to be the heir at law of one *Thomas Linsey*, had made an entry upon the premises in question in *November* 1801, and had then procured from the tenants in possession, or some of them, the payment of a shilling each, and their signatures to an instrument which was tendered in evidence, and received as an attornment. It was objected that this, being unstamped, was inadmissible; and the case of *Cornish v. Searell* (*a*) was relied on,

(a) 8 B. & C. 471.

to shew the necessity of a stamp. By the instrument produced in that case the defendant "attorned and became tenant" of certain lands, "to hold the same for such time, and on such conditions, as might be subsequently agreed on" between him and the plaintiffs. It was held that this instrument ought to have been stamped, as being not a mere attornment, but an agreement for a new tenancy, on terms still to be arranged, and which might vary from those under which the defendant had been previously holding. It was not contended that a mere attornment required any stamp; and we think the present instrument was rightly considered as nothing more. *Holroyd J.* defines, in the case cited, an attornment to be "the act of the tenant's putting one person in the place of another as his landlord," and observes that "the tenant who has attorned continues to hold upon the same terms as he held of his former landlord." This appears exactly to agree in effect with the present instrument, the language of which is, we "hereby severally attorn and become tenants and undertenants to the said *George Linsey*, from old *Michaelmas* last past, of and for such part and parts of the said estate and premises as is and are in our respective occupations, at and under the several yearly rent and rents now paid by us, and under which we now hire and occupy the same." Tenants and under tenants equally join in this, each for his respective portion of the premises: the same rents remain; no term is specified, nor conditions referred to. We think, therefore, that this objection was properly overruled at the trial.

But it was next objected, that this instrument was inadmissible against the present defendants. It was signed by *Thomas Edwards*, among others, as under-

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tenant to one *Bloom*, whose name appeared written above, as tenant, and *Bloom* was proved by a witness to have occupied, at the date of the instrument, one part of the premises. *Thomas Edwards* was the husband of the defendant *Sarah Edwards*, and was also proved to have been at the time in occupation of some part of the premises. Without enquiring whether this would become evidence against *Sarah Edwards*, because she was the widow of *Thomas*, and claiming to hold the same premises, it seems to us sufficient to say that this paper formed a material part of an entire transaction, the whole of which was evidence for *George Linsey* and any one claiming under him, as an assertion of right and act of ownership on his part, acquiesced in by the tenants then in possession.

This mode of considering the evidence disposes of a third objection, that, at the date of the attornment, *Thomas Edwards* only occupied a part of the premises, called the *Staithe*, which *Sarah Edwards* was shewn to have purchased subsequently of another person, not claiming through him. For the admissibility of the evidence does not rest on any privity between *Thomas* and *Sarah Edwards*: it can hardly be doubted that, if *Linsey* had been shown to have entered, and made a lease under which occupation had been had and rent paid, these facts would have been substantive evidence of ownership against any future occupants, as much as the cutting down timber, building, planting, or cultivating the land. And this transaction differs, not in kind, but in degree, from the acts just enumerated.

It was next objected that as, from this period, *November* 1801, down to the date of the demise, there was no evidence of any possession by the lessor of the plaintiff, or of any

act

act of ownership, there was nothing to offer to the jury in proof of a right of entry within twenty years. The statute of 3 & 4 W. 4. c. 27. was not adverted to in the argument, and we understand that the action was commenced before the 31st December 1833: it is, therefore, unnecessary to consider the question which would have arisen upon this point under the 2d, 8th, and 15th sections, if the statute had applied to the case. But, considering the whole evidence without reference to the statute, we are of opinion that this objection must prevail. The facts stand thus. In 1773 *Frances Blyford*, whom we may consider, for the sake of the argument, as tenant for life only, with a remainder in fee to the supposed ancestor of the lessor of the plaintiff, suffers a common recovery; and in 1795 surrenders to the use of herself for life, remainder to *Dixon Gamble* in fee. About 1800 or 1801 she dies, the tenants at that time all holding of her: in 1801 the entry of *Linsey* and attornment take place, and 1s. rent is paid by *Edwards*, who was then under-tenant of part; in 1802, *John Gamble*, the heir at law of *Dixon*, is admitted; in the same year the property is divided, and *Edwards* becomes the purchaser of a part, other than that which he had occupied before as tenant, and which in 1814 he and his wife surrender to *Sarah Chamberlin* and *Elizabeth Barnes* in fee, under whom the defendant *Chamberlin* probably claims; the other part is surrendered by *John Gamble* in 1806, and by various mesne surrenders comes to the defendant *Edwards* in 1813. During this whole period, from the death of the supposed tenant for life, this property is dealt with, by those under whom the defendants claim, and themselves, as their own rightful property, the quit rents are paid, leases made,

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the profits received, repeated conveyances executed, and possession had under them. We think it would be highly dangerous, and contrary to the established policy of the law, if we were to suffer a doubt to be cast upon the security of such a possession by a solitary act, such as the entry and attornment of 1801, not followed up by any assertion of right whatever for more than thirty years. We think that solitary act of entry and attornment in 1801, followed by no assertion of right for upwards of thirty years, is no evidence of a possession *not* being adverse. If that act, at the distance of thirty years, will prevent the possession of the present defendants from acquiring an adverse character, at what period would the right of entry have ceased? When would the statute of *James* have begun to have an operation? We cannot see on what principle, putting the statute of *W. 4.* out of consideration, the action might not have been equally sustainable fifty years hence, or why, even with the statute, it might not have been maintained if the transaction of 1801 had been thrown back twenty years earlier.

We think it better to decide the case upon this point, which may be of general application, than upon that which was last made by the defendants, and much discussed in the argument, namely, whether *Frances Blyford*, under the codicil to her father *Ellis Braham's* will, took an estate in tail, or for life only; upon which we express no opinion. But, upon the ground that the lessor of the plaintiff has failed to give any evidence which, properly considered, explains the apparent adverse possession for more than twenty years, we are of opinion that this rule should be discharged.

Rule discharged.

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TIBBITS, Assignee of FRANCES THOMPSON, an *Monday,*
Insolvent Debtor, against GEORGE. *June 18th.*

ASSUMPSIT. First count for money had and received to the use of, and on an account stated with, the insolvent before her discharge, with promise to the insolvent before her discharge. Second count for money had and received to the use of the plaintiff as assignee, and on an account stated with him as assignee. Plea, Non Assumpsit. On the trial before *Littledale J.* at the *Northamptonshire* spring assizes, 1835, the plaintiff proved that on the 22d of *April* 1833 he commenced an action against the insolvent for 22*l.*, on which a verdict was recovered on the 8th of *July* 1833, the Judge certifying that execution should issue on the 20th of *August*. On *August* 27th the insolvent was taken in execution on a ca. sa. in that action, and she was conveyed to the county gaol on the 29th: on the 17th of *September* she petitioned the Court for the relief of insolvent debtors, and on the same day executed her assignment to the provisional assignee; on *October* 30th

M., owing 40*l.* to *T.*, became bankrupt. Defendant advanced 105*l.* to *T.*, who was then solvent, on a bonâ fide verbal agreement that he should be repaid out of the debt from *M.* to *T.*, and the dividends thereon; and *A.*, the solicitor to *M.*'s commission, was privy to the bargain; but it did not appear that *A.* acted for *M.*'s assignees in the transaction, or communicated it to them, or that they knew of it, till after *T.* was taken in execution on a judgment recovered against

her in an action commenced more than three months after the time of the agreement. Within three months before the arrest, and before the verdict in the action but after its commencement, *T.* gave defendant a written order on *M.*'s assignees to pay the 105*l.* to defendant. After the verdict, but before the arrest, *T.* assigned in writing to the defendant the debt due to her from *M.*, and the dividends; and, on the same day, *T.*, for the first time, proved her debt against *M.*'s estate. The dividends amounted to 80*l.*, which defendant received from *M.*'s assignees. Afterwards *T.* was discharged by the Insolvent Court, and her assignee sued defendant for money had and received. Held,

(1.) That the transfer to defendant of the right to part of the debt due from *M.* to *T.* was not void, under stat. 7 G. 4. c. 57. s. 32., the bonâ fide verbal agreement being sufficient to pass it, and the assent of *M.*, or his assignees, not being necessary to give the defendant an equitable title.

(2.) That the legal property in such part of the debt was not in the plaintiff, the defendant being equitably entitled to that specific part at the time of the imprisonment, although a contingent residue of the whole debt might ultimately come to the plaintiff.

(3.) That the whole debt was not in the disposition of the insolvent, under stat. 7 G. 4. c. 57. s. 30., the knowledge of *A.* being tantamount to the knowledge of *M.*'s assignees. Judgment for defendant.

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against
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she signed her schedule; and on *November 30th* she was discharged by that Court, and the plaintiff was appointed sole assignee. On the 8th of *November 1833*, *William Proe*, the surviving assignee of *James Mercer* a bankrupt, paid to the defendant 80*l.* 17*s.* 6*d.* as the dividend on a debt proved by the insolvent against *Mercer's* estate. The defendant proved that *Mercer* had become bankrupt in the early part of *June 1832*, and that, at that time, he was indebted to the insolvent in about 404*l.*, for which she held a mortgage: that in the same month the defendant advanced 105*l.* to her, on a verbal agreement that he should be repaid out of the debt owing from *Mercer*, either under the commission, or through the mortgage: that, on *June 19th 1833*, the insolvent signed a written authority directed to the assignees of *Mercer*, authorising them to pay the defendant 105*l.*, or so much as the dividend due to her would extend to: and that, on *August 5th 1833*, she executed an instrument, whereby, after reciting her debt to the defendant, and her claim on *Mercer's* estate, she assigned to the defendant the debt due from *Mercer's* estate and the dividends thereon, upon trust, after payment of expences, to retain 105*l.* or so much as the dividends would cover, and pay the residue to the insolvent; the instrument contained also the usual covenants and power of attorney. On the same 5th *August 1833*, after executing this assignment, the insolvent proved her debt against *Mercer's* estate. An attorney named *Archbald*, who was solicitor to *Mercer's* commissioners, was present at the making of the verbal agreement in *June 1832*, and he advised the parties that no writing was required. He communicated this agreement to one of *Mercer's* assignees; but it did not appear

at

at what time he did so. The counsel for the plaintiff objected that there was no valid transfer of the debt, as against the assignee of the insolvent; the learned Judge, however, desired the jury to say whether they believed that the verbal agreement of *June* 1832 was made irrevocably and *bonâ fide*, and whether *Archbald* was cognisant of it, and at what time *Thompson* first became insolvent. The jury found that the agreement was made *bonâ fide*, that *Archbald* was cognisant of it, and that *Thompson* was insolvent in *July* 1833. They also found that *Archbald* had not communicated the verbal agreement to the assignees of *Mercer* before the arrest and imprisonment. The learned Judge then directed a verdict to be entered for the defendant, giving leave to the plaintiff to move to enter a verdict for 80*l.* 17*s.* 6*d.* In Easter term 1835, *Waddington* obtained a rule to shew cause why the verdict should not be so entered, or a new trial had.

Adams Serjt. and *Humfrey* shewed cause in Easter term last (a). It is true that, as no evidence was given of the defendant having pressed the insolvent for the debt, at the time when the written authority and the assignment were given, and as these were both given within three months of the commencement of the imprisonment, they would not of themselves, effect a valid transfer of the debt. But there was a *bonâ fide* agreement made, for a valuable contemporaneous consideration, more than a year before the imprisonment, and before the insolvency. After that, the defendant might at any time, by a proceeding in equity, have compelled

(a) April 29th. Before Lord Denman C. J., Littleale, Patteson, and Coleridge J.

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the insolvent to assign, or might have sued her at law for breach of the agreement. No case has occurred, in which conveyances, made more than three months before the imprisonment, and without fraud, have been held void under stat. 7 G. 4. c. 57. s. 82. The assignee might have paid the money over without the written authority or assignment. The only other question is, whether the debt was, at the time of the arrest and commencement of the imprisonment, in the apparent disposition of the insolvent with the defendant's consent, so as to pass to the plaintiff under section 30. It will be said this was so, for want of notice of the verbal agreement to *Mercer's* assignees. But notice to the solicitor to the commission, at the time of the verbal agreement, is proved; and this is, in fact, much more effectual than notice to his clients would have been. Every thing, therefore, which the defendant could be required to do, for the purpose of taking the debt out of the apparent disposition of the insolvent, has been done.

Waddington and Miller, contra. First, the written authority and assignment must be left out of the case, for it is admitted that they would be fraudulent and void under the thirty-second section. And, therefore, if the parol agreement was not completely effectual for the transfer of the debt, independently of all which occurred within three months of the arrest, the debt has not been transferred. [*Coleridge J.* An act done within the three months would not be fraudulent, if it were merely a completion of a previous lawful transaction; as if a party were bound, by a previous agreement, to indorse a bill, and did so within the three months.] If
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the former transaction were incomplete without the later one, the later could have no effect. Secondly, the debt was, at the time of the arrest and commencement of the imprisonment, in the disposition of the insolvent, for want of notice to the holder of the fund from which it was to be paid; *Buck v. Lee (a)*, *Ex parte Cobhill and Geddes (b)*. [*Patteson J.* Knowledge is enough, from whatever quarter obtained; a formal notice is not necessary; *Smith v. Smith (c)*]. A formal notice is not indeed necessary: but the holder must have knowledge in some way; otherwise the insolvent would have a fictitious credit. Here it does not appear that the assignee of *Mercer*, or *Mercer*, had any knowledge of the transfer before the imprisonment. Notice to the solicitor is insufficient: and here it does not appear that the notice was given to *Archbald* as the solicitor to the bankruptcy: he merely knew the facts as adviser of the insolvent and the defendant. Thirdly, supposing the transfer to have been valid, so far as regarded the amount due from the insolvent to the defendant, still, as the insolvent remained entitled to the contingent residue of the fund in the hands of *Mercer's* assignees, up to the full amount of her own debt, the whole legal property in the fund remained in the assignee of the insolvent, subject only to the equitable right of the defendant; *Carvalho v. Burn (d)*, affirmed on error in the Exchequer Chamber, *Burn v. Carvalho (e)*, and recognised in *Leslie v. Guthrie (g)*, where, however, it ap-

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 TRANS
against
GROVER.

(a) 1 A. & E. 804.

(b) *Mont. Ca. Bank.* 110., before Vice-Chancellor Sir L. Shadwell; affirmed by Lord Chancellor Brougham, *Ex parte Tennyson*, *Mont. & Bl. Ca. Bank.* 67.

(c) 2 Cr. & M. 231. S. C. 4 Tyrwh. 52.

(d) 4 B. & Ad. 382.

(e) 1 A. & E. 883.

(g) 1 New Ca. 697. S. Ca. 1 Hodg. 83.

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peared upon the pleadings that no residue could exist. So in *Crowfoot v. Gurney* (a) the transfer was held complete, only because the balance constituting the fund transferred was ascertained before the party transferring became bankrupt. The transfer does not pass the legal property, unless it operate clearly on the whole fund, or on a specified part. [*Coleridge J.* The intent was apparently, in this case, to transfer all the fund which was expected to arise]. It remained uncertain, up to the imprisonment, what fund would arise in fact: therefore all that could be done was to give an equitable lien on that fund to the amount of the valuable consideration. [*Patteson J.* Assuming your view to be correct, the plaintiffs would at any rate become trustees for the defendant: is there any authority for saying that a trustee can sue the cestui que trust for money had and received?] In *Carvalho v. Burn* (b) the same objection might have been made. [*Littledale J.* That was an action of trover.] It was however an action by the legal owners against the parties having an equitable lien. In *Leslie v. Guthrie* (c) the action was assumpsit for freight. [*Patteson J.* There the defendant was the original debtor, not the cestui que trust]. In *Best v. Argles* (d) the principle now relied upon was applied to an action for money had and received, brought by the assignee of an insolvent against a party to whom the insolvent had transferred the debt. Fourthly, an agreement, without an order on the holder of the fund, or the assent of the holder, is not a good transfer. The absence of such assent is the foundation of the judgment in *Best v.*

(a) 9 Bing. 372.

(b) 4 B. & Ad. 382. *Burn v. Carvalho*, 1 A. & E. 883.

(c) 1 New Ca. 697. S. C. 1 Hodg. 83.

(d) 3 C. & M. 394. S. C. 4 Tyrwh. 256.

Argles (a). The previous cases are commented upon and distinguished in that judgment. In *Row v. Dawson (b)*, which is the case most strongly against the plaintiffs, there was a draft on the fund for a specific sum; and Lord *Hardwicke* relies on that fact: and the draft had been communicated to the party on whom it was drawn, whose assent might therefore be implied. In *Ex parte South (c)* there was also a written order and an assent; and there the consideration for the transfer exceeded the debt which was transferred. In *Crowfoot v. Gurney (d)* the original debtor assented. In *Watson v. The Duke of Wellington (e)* the cases on this point were discussed; and there the Master of the Rolls, Sir *John Leach*, held that a verbal agreement to pay a sum out of a particular fund, not followed by a direct order assented to by the owner of the fund, did not create any equitable lien. And *Best v. Argles (a)* shews that an equitable claim, even on the whole fund, if not perfectly clear, does not entitle the claimant to resist an action for money had and received.

Cur. adv. vult.

LORD DENMAN C. J. in this term (June 13th) delivered the judgment of the Court.

This was an action brought by the assignee of an insolvent debtor, to recover from the defendant a sum of money received by him under the following circumstances. It appeared that one *Mercer* was indebted to the insolvent in a sum of 404*l.*, for which *Mercer* had given to the insolvent a mortgage on some property, subject to a prior mortgage. *Mercer* became bankrupt;

(a) 2 C. & M. 394. 3 C. 4 Tyrwh. 256.

(b) 1 Vez. sen. 331.

(c) 3 Swanst. 392.

(d) 9 Bing. 372.

(e) 1 Russ. & Mylne, 602.

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and a commission was sued out, to which one *Archbald* was the solicitor. The insolvent, having no means of support but the interest of this debt, was reduced to much difficulty by the bankruptcy, and consulted the defendant, who advanced her several sums of money on the security of the debt. An agreement, not in writing, was entered into *bonâ fide* (as was found by the jury, and which finding is not impeached), by which the insolvent verbally assigned to the defendant any dividends she might be entitled to under *Mercer's* commission, and any money she might receive from the mortgage, for securing his advances. *Archbald* was present at the making of this agreement, and entirely privy to it, and advised that no writing or formal assignment was necessary, because the money must pass through his hands, and he would take care it should be paid: but it was found by the jury that he had not communicated the agreement to *Mercer's* assignee. At that time the insolvent had not proved under the commission, being advised not to do so, but to rely on her mortgage. Ultimately the mortgage was found to be of no value, and the insolvent proved her debt under the commission. She afterwards took the benefit of the Insolvent Act, and subsequently received from the assignee the sum of money in question in this action, which she handed over to the defendant, and which was much less than his advances. The case was tried at the assizes for *Northampton*, in the spring of 1835, and a verdict found for the defendant.

The insolvent, previously to her going to prison, had assigned the debt by deed; but it was under such circumstances that, but for the former agreement found by the jury, the transaction would have been void under

stat.

stat. 7 G. 4. c. 57. s. 32. The case of the defendant therefore rests on the original agreement found by the jury to have been *bonâ fide*.

Three objections were taken on a rule nisi to set aside this verdict. First, that the debt due from *Mercer's* estate was in the order and disposition of the insolvent within the thirtieth section of 7 G. 4. c. 57. for want of express notice to *Mercer's* assignee. Secondly, that there was no valid assignment, either at law or in equity, for want of some writing, or some express assent of the assignee of *Mercer*. Thirdly, that, as the insolvent had a residuary interest after payment of the defendant's advances, the whole debt passed to her assignee, subject to the defendant's claim or lien, supposing it to be valid.

We are of opinion that none of these objections can be sustained, and that the verdict ought to stand.

As to the first, it is not necessary that formal notice should be given to the debtor; it is sufficient if it be shown that the fact of assignment was communicated to him; *Smith v. Smith (a)*, *Ex parte Watkins (b)*. In this case, the knowledge of *Archbald*, the solicitor to the commission, is, we think, the knowledge of the assignee, and sufficient to prevent the operation of the 30th clause of the Insolvent Act.

As to the second, none of the authorities which have been cited shew that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very many of the cases there was a writing; and, as to express assent, it is undoubtedly held that, in order to give an *action at law*, the debtor

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(a) 2 Cr. & M. 231. S. C. 4 Tyrwh. 52. (b) 1 Mont. & Ayr. 689.

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must consent to the agreed transfer of the debt, and that there must be some consideration for his promise to pay it to the transferee; but in equity it is otherwise, as was expressly stated by Lord *Eldon* C. in *Ex parte South* (a): and the same doctrine is to be found in many other cases. It is sufficient if there be an engagement by the debtor that a particular fund shall be charged with or appropriated to the payment of the debt. That was so in the present case; and indeed the consent of *Archbald* might fairly be treated as the consent of the assignee of *Mercer*, if that were necessary. If, then, there be a valid equitable assignment, the thing assigned would not pass to the plaintiff under the Insolvent Act, because, as has been often held, the assignee of an insolvent or bankrupt takes only what the insolvent or bankrupt is beneficially entitled to. The case of *Best v. Argles* (b) approaches very nearly to the present case, and was decided on the ground that the facts did not clearly amount to an assignment in equity. Perhaps we may think that the Court might in that case have taken on themselves to say that there was an assignment in equity; but, however that may be, we think that the present case is free from doubt, and that it is unnecessary to drive the parties to a court of equity.

As to the third objection, the case of *Carvalho v. Burn* (c) is relied on; as to which it is sufficient to say that it was an action of trover for the whole goods, on which it was said that there was a lien, or which were said to be assigned, both the produce of the goods and the debt for which there was a lien, or for

(a) 3 *Swanst.* 392. (b) 2 *C. & M.* 394. *S. C.* 4 *Tyrwh.* 256.

(c) 4 *B. & Ad.* 382.; *Burn v. Carvalho*, 1 *A. & E.* 883.

which

which they were assigned, being uncertain in amount, and there being a clear residuary interest in the bankrupt; whereas, in the present case, the debt is certain, and the subject matter of assignment is certain, viz. so much of the dividends, and no more, as would be sufficient to satisfy that debt. The whole of the dividends, if they had exceeded the debt, would not have passed under the assignment; and, as soon as the debt was satisfied, the remainder would be paid to the plaintiff for the benefit of the insolvent's creditors. Therefore, neither could the defendant become trustee for the plaintiff, nor the plaintiff for the defendant, and the case of *Carvalho v. Burn* (a) is not in point.

The rule must be discharged.

Rule discharged.

(a) 4 B. & Ad. 382.; *Burn v. Carvalho*, 1 A. & E. 883.

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Monday,
May 23d.

GUEST *against* HENRY ELWES, Esquire.

Declaration against sheriff for an escape. Pleas, Not Guilty, and that defendant did not arrest. Issues thereon. At the trial, the plaintiff's evidence shewed that the plaintiff had not arrested, but had negligently omitted to do so. The Judge would not amend the record, under stat. 3 & 4 W. 4. c. 42. s. 23., but allowed the case of negligent omission to be proved. The jury found the fact of omission specially, and assessed the damages at 30*l.*; and a verdict was entered for the defendant on both issues, and the special finding indorsed on the record, under sect. 24.

Held that this Court might give judgment for the plaintiff according to the right of the case, the variance being immaterial and the defendant not prejudiced.

Quare, whether the Judge, in acting upon sect. 24., might impose terms on the party availing himself of the statute. But, he not having imposed them, this Court declined doing so.

The *postea* stated the finding as to the sheriff's default, and the assessment of damages, and that, it appearing to the Court that, according to the very right &c., plaintiff ought to have judgment to recover his damages (not mentioning costs), therefore &c.

The Court, on a subsequent application by plaintiff, ordered the Master to tax plaintiff his general costs of the cause, but to allow defendant his costs of the issues; and that each party should pay his own costs of the motion to enter judgment according to the right.

ACTION on the case against the Sheriff of *Gloucestershire*. The declaration stated that the defendant, having arrested one *Hobbs* on a *ca. sa.* at the plaintiff's suit, afterwards, without the leave and against the will of the plaintiff, voluntarily and wrongfully suffered and permitted him to go at large, the debt being unsatisfied, and falsely returned *non est inventus*. Plea 1. Not Guilty. 2. That the defendant did not arrest *Hobbs*; conclusion to the country. Issues were joined on both pleas. On the trial before *Alderson B.*, at the *Gloucestershire* summer assizes, 1834, it appeared in evidence that the officer did not arrest, but negligently omitted to arrest, having opportunity. The plaintiff's counsel applied to the learned judge for leave to amend, which he did not grant, but permitted the trial to go on, with proof of the negligence now stated, in order that the fact, if found by the jury, should be indorsed on the record (*a*). The jury found that the transaction was in fact an omission by the officer to arrest; and they assessed the plaintiff's damages at 30*l.* A verdict was taken for the

(a) Stat. 3 & 4 W. 4. c. 42. s. 24.

defendant

defendant, and the special finding indorsed on the record. *Talfourd* Serjt., in the next term, obtained a rule to shew cause "why the verdict for the defendant should not be set aside, and judgment given, according to the special finding of the jury, for the plaintiff, with 30*l.* damages, the record being amended so as to charge a negligent omission to arrest." In last *Hilary* term (a),

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Ludlow Serjt. and *W. J. Alexander* shewed cause. This is not an application which the Court can grant under the statute. The declaration called the attention of the defendant to a matter of charge distinct from that now relied upon; as to which, if apprised of it, he might have prepared a defence, or suffered judgment by default. No case has gone the length of authorising such an alteration as this. [Lord *Denman* C. J. We are not called upon by the statute to amend the record, but to say, the jury having given in a special finding, which is indorsed on the record, whether judgment shall be entered conformably to it]. *Hanbury v. Ella* (b) and *Frankum v. The Earl of Falmouth* (c) shew what variances the Court will consider immaterial and what material, under stat. 3 & 4. *W. 4. c. 42. ss. 23, 24.* This was of the latter kind; the mis-statement prejudiced the party in his defence.

Talfourd Serjt., *contra*. The defendant's counsel went to the jury upon the new point raised at the trial.

(a) January 20th. Before Lord *Denman* C. J., *Littledale, Williams, and Coleridge* Js.

(b) 1 *A. & E.* 61.

(c) 2 *A. & E.* 452.

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ELWES.

The Court took time to confer with *Alderson B.*

Cur. adv. vult.

Lord Denman C. J., in *Easter* term last (*May* 6th), delivered the judgment of the Court. Having stated the nature of the application, and the facts of the case, his Lordship proceeded :

After conference with the learned Judge, and indeed upon the argument at the bar, we were fully convinced that in this case the defendant experienced no disadvantage whatever from the course adopted, and that on the other hand the plaintiff, who had suffered by some breach of duty on the part of the Sheriff, and who most probably was without the means of discovering beforehand precisely what it was, might have been really injured by too strict an adherence to the issue actually joined.

We do then think the variance immaterial to the merits of the case, and that this mis-statement could not have prejudiced the defendant in the conduct of his defence ; and the statute under these circumstances requires that we should give judgment according to the finding of the jury.

Much doubt was felt by the Court, whether the rule ought to be made absolute without the imposition of some terms on the successful party, whose mistake has been corrected, and whose right, if claimed as it has been proved, might possibly never have been disputed by the defendant. We think, however, that we have no power to do this, under the terms of the section. Whether the Judge might properly exact conditions from the party in whose favour the issue joined is abandoned, and a new one tried, we need not give any opinion ;

opinion; for here, in the exercise of his discretion, he has permitted the very right to be determined; and we are of opinion that the variance is immaterial, and that the mis-statement could not have prejudiced the defendant in the conduct of his defence. The act requires us to give judgment accordingly; and costs must follow as a matter of course.

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The rule having been drawn up as made absolute in the terms in which it was moved,

W. J. Alexander now applied to the Court that the rule might be altered, by omitting the words which directed that the verdict should be set aside and the record amended, on the ground that these were directions which the Court was not authorised to give under the statute. [*Patteson* J. The rule, as it stands, appears contradictory to itself.]

The Court granted a rule nisi, which, on a subsequent day of this term (*June 10th*), was made absolute, no cause being shewn. The rule ultimately drawn up was, "That judgment be entered, according to the special finding of the jury, for the plaintiff with 30*l.* damages."

The parties afterwards met to tax costs, and the *postea* was produced. After the usual commencement, it stated that the jury "upon their oath say, as to the first issue within joined between the parties, that the defendant is not guilty," &c. "And, as to the other issue within joined between the parties, the jury aforesaid upon their oath aforesaid say that the defendant did not take and arrest the said *Joseph Hobbs* in manner and form as the plaintiff hath within in that behalf alleged,

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alleged ; and thereupon the said Judge before whom the said issues came on to be tried, to wit, the said Sir *Edward Hall Alderson*, Knight, having, according to the form of the statute in that case made and provided, directed the said jurors to find the facts according to the evidence, the jurors aforesaid upon their oath aforesaid did further find and say, according to the form of the said statute, that the defendant had been guilty of a negligent omission to arrest the said *J. Hobbs* within named ; and they assessed the damages which the plaintiff had thereby sustained to 30*l.* : and, it now appearing to the said Court here that the variance, between the mode of stating the cause of action in the declaration within mentioned and the cause of action as it appeared upon the finding of the said jurors, is immaterial to the merits of the case, and that the mis-statement of the cause of action in the said declaration was and is such as could not have prejudiced the defendant in the conduct of the defence to the said action, and that, according to the very right and justice of the case, the plaintiff ought to have judgment to recover his said damages, therefore &c." The Master allowed the plaintiff his full costs as if he had succeeded on both the issues, and also the costs of his application to this Court, and allowed no costs to the defendant.

In *Michaelmas* term, 1836, a rule was obtained, calling on the plaintiff to shew cause why the taxation of costs for the plaintiff should not be set aside, and why the Master should not tax the defendant his costs of the cause, or why the Master should not review his taxation of the plaintiff's costs and tax the defendant his costs of all the issues, and why the costs which the Master might allow the defendant should not be deducted

ducted from the plaintiff's damages, or damages and costs. In *Trinity* term, 1837,

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R. V. Richards shewed cause (a). The taxation is right. The question really in dispute between the parties was tried, and the result was the same as if both the issues had been found for the plaintiff. This Court has held that the variance was immaterial and could not prejudice the defendant. The Master had no right to impose any terms under which judgment should be entered according to the special finding: the direction of this Court, that judgment should be so entered, is, in effect, an adjudication that the plaintiff is entitled to costs. There is a general judgment for the plaintiff; and he cannot receive the benefit of it, nor can the statute 3 & 4 W. 4. c. 42. s. 24. have its proper effect, unless this taxation stands. The rule, *Hil. 2. W. 4. I. 74. (b)*, cannot apply, because there are no issues on which the plaintiff has not, in effect, succeeded. Before the new rules of pleading, a count might have been added for not arresting, and the plaintiff would clearly have been entitled to a verdict. The Court has held that this case stands, in effect, as if there had been such a count, and a verdict for the plaintiff upon it. It would be very hard, therefore, if he could not obtain his costs.

Sir *W. W. Follett* and *W. J. Alexander*, contra. The legislature, in making the enactment 3 & 4 W. 4. c. 42. s. 24., did not contemplate the question now raised, namely, whether, upon judgment being entered according to that section, the plaintiff ought to have his costs as in an ordinary case. Here, certain issues have been

(a) May 24th. Before Lord Denman C. J., *Littledale* and *Patterson* J.

(b) 3 B. & Ad. 385.

joined.

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joined. The defendant had no notice that any other was to be tried. The plaintiff might have added a count for omitting to arrest, which is a distinct cause of action. On the trial, an application was made to amend the record under sect. 23. Had that been granted, the Judge might have required the party amending to pay costs, but not the party against whom the application to amend was made. Then sect. 24., referring to the provisions of sect. 23., enacts that, "in all such cases of variance," the Judge may, instead of directing the record to be amended, direct a special finding of the facts, which shall be indorsed on the record, and the Court shall, if they think the variance immaterial, give judgment according to the right. Under that section there arises, in the present case, this peculiar state of facts. Two issues appear on the record, with a finding for the defendant on each; and the Court is asked to give judgment for the plaintiff as if he had recovered. [*Patteson J.* The act does not authorise the Court to amend. The verdict appears on the record coupled with the special finding. This must occur in every instance where the Judge at Nisi Prius does not amend, and the Court is called upon to act under sect. 24.; and it must have been contemplated by the legislature.] The objects of sect. 24. do not appear to have been fully worked out. No direct provision is made for costs; nor is any discretion given respecting them, either to the Judge at Nisi Prius, or to the Court. [*Littledale J.* The Court is to give judgment according to the justice of the case: when the Court gives judgment for damages, does not that carry costs, by the statute of *Gloucester (a) ?*]. The jury must find something for

(a) 6 Ed. 1. c. 1. s. 2.

costs ;

costs; and then the Court gives costs de incremento. But here the jury has found damages only. On enquiry, no precedent has been found of a *postea* like the present, where damages are given, but not costs. [*Littledale J.* Might not the Court give judgment *ex officio*, as they judicially found the right to be, with respect to costs? *Greene v. Cole (a)*.] The jury has no right to give costs to the plaintiff under stat. 3 & 4 *W. 4. c. 42. s. 24.*; neither, therefore, could the Court award them. The attention of the Court does not seem to have been called to this point on the former discussion (*b*). [*Lord Denman C. J.* We thought it clear that we had no power to impose terms upon the party ultimately succeeding, though we did not say that the Judge might not have done so at the trial.] It is a hardship on the defendant if no costs are awarded to him: for, if there had been a count in the declaration for not arresting, as well as a count for the escape, and pleas to each, upon which, as well as upon Not Guilty, issues had been joined, there would have been no amendment or special finding, and the defendant would have had a verdict and his costs on the issue as to an escape. He is therefore in a worse situation now, by obtaining no costs, than if a verdict had gone against him upon two issues out of the three just supposed. The Court has decided that it could not set aside the verdict found for the defendant; and, unless that be done, and, in effect, a new record created, the plaintiff cannot have costs, but the defendant is entitled to them by stat. 23 *H. 8. c. 15. s. 1.* [*Patteson J.* The Court never decided that it could not set aside the verdict. We thought that the special finding was as much a part

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against
ELWES.

(a) 2 *Saund.* 257.(b) They referred to *Guest v. Elwes*, 2 *Harr.* 34.

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of the verdict as the finding on the issues, and that the whole must be taken together.] The special finding leaves the verdict for the defendant upon the two issues untouched. The plaintiff may avail himself of that finding as he can; perhaps he should have moved the Court to amend the record. [*Patteson J.* In *Parry v. Fairhurst* (a) the Court of Exchequer amended the record, when the Judge had declined doing so at *Nisi Prius*; but their power to amend does not appear to have been at all discussed; and it seems that the question of amendment was referred to the Court by consent. The Court, in giving judgment, do not say that they have the power by sect. 24. An amendment of the record by the Court is not consistent with the terms of stat. 3 & 4 W. 4. c. 42. s. 24., which requires the Court to give judgment "notwithstanding the finding on the issue joined," if they think the variance immaterial.] As this record stands, the defendant, not the plaintiff, is entitled to costs by the rule *Hil. 2 W. 4. I. 74. (b)*, for the plaintiff has not succeeded on either of the issues, and the defendant has succeeded on both. If the plaintiff had amended, he must have paid costs, and the sheriff would perhaps not have defended the action further. *Doe dem. Smith v. Webber* (c) shews that a defendant is entitled to his costs of preparing to meet a case put upon the record, but afterwards abandoned by the plaintiff, though such defendant has attempted, but without success, to apply his evidence to the case on which the plaintiff proceeded. The plaintiff here may be entitled to the 30*l.* damages for which judgment has been given; but he has no right to costs under the late act, for nothing is there said of

(a) 2 C. M. & R. 190. S. C. 5 Tyrwh. 685. (b) 3 B. & Ad. 385.

(c) 2 A. & E. 448.

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 against
 ELWER.

costs, nor under the statute of *Gloucester* (a), because there has been no action brought or issue joined on which he has recovered. The case of an amendment is different, because that relates back to the original process, and "writ purchased." [*Patteson* J. The reason for which the Court ought not to amend in a case like this seems to be that the jury were sworn to try the issue as it appears upon the record; the issue cannot be altered and yet the verdict stand.] If it had been intended by stat. 3 & 4 W. 4. c. 42. s. 24. that costs should be given, they would have been mentioned; but there appears no reason that they should be given in a case where the Judge does not think fit to amend. In that case, under sect. 24, a plaintiff may obtain judgment for so much as the jury may say they think him entitled to, but not such a judgment as if the action had been originally brought for the cause insisted upon at last. The award of costs by the jury, where they are entitled to give them, is a distinct finding, and material to the judgment. It is said in 2 *Hullock* on Costs, 650 (b), (citing *Heines v. Guie* (c) and other authorities) that, "If the costs assessed by the jury be omitted in the entry of the judgment, it will be error. And where the costs *de incremento* were, in the entry of the judgment, said to be assessed *per juratores*, instead of *per curiam*, it was held to be error. But, if judgment be given for the damages and costs assessed by the jury, the want of judgment for costs *de incremento* is not error." [*Little-dale* J. According to the old authorities, the reason of costs being expressly awarded by the jury is to shew the particular amount given for costs, separately from that

(a) 6 Ed. 1. c. 1 s. 2.

(b) C. 14. 2d ed.

(c) *Yelv.* 107.

given

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against
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given for damages (a). His Lordship also referred to *Ward v. Snell* (b).] It may be questioned whether, under sect. 24 of stat. 3 & 4 W. 4. c. 42, the jury can even give damages: the clause only directs that they shall "find the fact or facts;" and under the former practice it was a frequent course for the jury to find facts, which were then indorsed on the postea. At all events the plaintiff cannot have his costs of the motions which have been rendered necessary by his own negligence. [*Patteson J.* I do not understand that sect. 24 was intended for cases where the Judge thinks there ought not to be an amendment. The course there directed is, "instead of causing the record or document to be amended;" that is, where he thinks it doubtful whether an amendment should be made or not.] The learned Judge here refused to amend. [*Patteson J.* He would not take upon himself to do it.]

Cur. adv. vult.

LORD DENMAN, C.J. in the same term (*June 9th, 1837*), delivered judgment as follows. The plaintiff declared as for an escape; but, the evidence not establishing that, he was permitted to go into a case of omission to arrest; and on that new case he succeeded. We think that the plaintiff ought to have the costs of the trial, having succeeded; and that the defendant ought to have the costs of the issues upon which he has succeeded: and that each party should bear his own costs of the application to this Court, and of the argument.

Ordered—"That it be referred to the Master to tax the plaintiff his general costs of this cause,

(a) See 2 *Hullock on Costs*, p. 649. c. 14. 2d ed. (b) 1 *H. Bl.* 10.

and

and that the said Master also tax the defendants (a) their costs upon the issues in which they have succeeded; and that each party pay his own costs of this application, and also the costs of arguing the question before the Court."

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—
GUEST
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ELWES.

(a) Sic.

Ex parte DUFFIELD.

Tuesday,
May 24th.

This case is reported, 3 A. & E. p. 617.

DOE on the Demise of LEWIS and Others *against*
BASTER.

Wednesday,
May 25th.

EJECTMENT for a messuage. On the trial at the *Middlesex* Sittings after last *Michaelmas* term, before Lord *Denman*, C. J., it appeared that the defendant held the premises of the lessor of the plaintiff, under a lease containing the following covenant:—"And also that no steam-engine, machine, or mill, shall at any time be used, erected, or set up, in or on any part of

The Judge at nisi prius having told the jury that, in case of their believing a particular fact, the verdict must be for the plaintiff, the jury retired, and the Judge and counsel

on both sides quitted the Court, leaving the associate. The jury returned into Court, and told the associate that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so: but the jury expressed to him their dissent, and said that they were not agreed to find for the plaintiff.

The Court discharged a rule nisi, obtained on affidavit of these facts, for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff.

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DOX dem.
LEWIS
against
BASTER.

the said premises, other than the mill now used by the said *John Baster*, in his present business of grinding or preparing corn, or a mill of the like kind and power, and without the licence of the said *William Lewis*," &c. (the lessor); "first had and obtained; and also that no act, matter, or thing whatsoever, shall at any time during the said term be done in or upon the said premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance, of the said *William Lewis*," &c., "or of the superior landlord or landlords, or any of their tenants," &c. There was a proviso of re-entry for non-performance of the covenants. The plaintiff's case was that the lease was forfeited by breach of the covenant above set out: and evidence was given that the mill mentioned in the lease had, at one time during the tenancy, been worked by the defendant by a horse, having been previously worked by hand, and that, in consequence of this change, the noise made in working it had increased. The Lord Chief Justice told the jury that, if they thought that the mill was changed to another of a different kind and power, or that the annoyance had been increased by the defendant, they must find for the plaintiff. The jury retired; and his Lordship and the counsel left the Court, the associate remaining. The jury afterwards came into Court, and handed in the following written verdict:—"The machinery is the same, but that (a) the annoyance has been increased during the application of the horse power." The associate then told them that this was a verdict for the plaintiff, and entered it accordingly: upon which several

(a) Sic.

of the jury expressed to him their dissent, and declared that they had not agreed to find for the plaintiff. On affidavits of these facts, *Andrews* Serjt., in *Hilary* term last, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the jury had not found for the plaintiff.

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against
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Platt now shewed cause. The facts found amount to a verdict for the plaintiff. It would be dangerous to allow verdicts to be altered on affidavits by the jury.

Andrews Serjt., and *W. H. Watson* contra. The verdict as entered is not the verdict of the jury. It appears by what passed in open Court that they did not mean to find for the plaintiff. There is either no verdict at all, or there is a special verdict, which ought to be entered in the words of the jury, in order that the defendant may raise the point of law before this Court. The law leans against forfeiture; and the defendant insists that, on these facts, his lease is not forfeited.

Lord DENMAN C. J. The jury clearly meant to find some verdict. I told them to find for the plaintiff, if they believed that the annoyance had been increased by the defendant: and they found that it had been so increased. That was a verdict for the plaintiff, unless there was a misdirection; and the associate would have done very wrong unless he had entered the verdict for the plaintiff. We must take the facts altogether, including what had passed before the verdict was given; we cannot pick out parcels of the transaction, so as to

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Doz dem.
 Lewis
 against
 BASTER.

treat that as a special verdict which was not so. When the officer told the jury that their finding was a verdict for the plaintiff, they then said that they did not wish to find for him. It is clear that they were unwilling to find a forfeiture. But if the verdict had not been for the plaintiff, the Court must have granted a new trial on the ground of the verdict being against evidence. I certainly felt that the defendant's case was a hard one: but I do not see what other conclusion could have been come to. I have therefore no doubt that the verdict, as now entered, is right. If we were to accede to the present application, there would be a danger that parties would evade the understanding that takes place between them and the judge on occasions of this kind, and take advantage of accidents to raise nice questions on the wording of verdicts.

LITLEDALE J. It appears to me that the direction at the trial was right. Then, suppose the Lord Chief Justice had remained in Court, and the jury had come in with the statement of their finding. They did not say that they found for the plaintiff; but, in the case supposed, his Lordship would have told them that such was the effect of their finding. If, upon that, they had refused to find for the plaintiff, his Lordship would have told them to re-consider their verdict; and, if they had then found for the defendant, their verdict would have been against the evidence. It is, however, said that they expressed their dissent from the manner in which the associate entered the verdict. But they might have waited till his Lordship came into Court: and, in that case, he would have told them that their verdict was

in

in effect for the plaintiff. We must, therefore, take it that the verdict is for the plaintiff. As to the suggestion that this is a special verdict, there is no application to enter it as such. And the motion was not made on the ground of misdirection.

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DON dem.
LEWIN
against
BASTER.

PATTESON J. The verdict must be taken with reference to the issue and the direction of the judge. I see nothing like a special verdict. His Lordship having told the jury that, if they find the annoyance to have been increased by the defendant, the verdict must be for the plaintiff, they do find that the annoyance is increased; but they say that they will not find for the plaintiff. They find the fact; but they refuse to find according to the legal result as expounded by the Judge. Had they insisted on going back, perhaps they might have done so: but they did not. They say that they do not choose to find for the plaintiff. That is nothing like a special verdict; and the associate was perfectly right in entering the verdict as he did. If the direction was wrong, the motion should have been for a new trial on that ground.

WILLIAMS J. The associate was substituted for the judge, who had retired, by the tacit consent, as it were, of counsel. The construction put upon the finding, by him, was only that which must have been put upon it by the judge.

Rule discharged.

1836.

Thursday,
May 26th.

The KING *against* The Justices of CORNWALL.

The parish of *G.* gave notice to the parish of *P.* of an appeal against an order removing *H.* and his wife, and children of the wife by a former husband, being under the age of sixteen, from *P.* to *G.*, stating, as the ground of appeal, that *H.* was not settled in *G.* (setting out objections to this settlement), and that the children were settled in *P.*, not stating what the nature of their settlement was. Held, that this was sufficient notice, as to the children, under stat. 4 & 5 W. 4. c. 76. s. 81.

And, the sessions having refused to receive evidence as to the settlement of the children, distinct from that of the husband, on the ground of insufficiency of notice, this Court issued a mandamus

commanding them to enter continuances and hear the appeal.

THE overseers of the parish of *St. Gluvias*, in Cornwall, gave notice to the overseers of the borough of *Penryn*, in the same county, dated 21st of March 1826, that they intended at the next General Quarter Sessions for the county to prosecute and try an appeal against an order of two justices "for and concerning the removal of *Charles Halvoso* and *Charlotte* his wife, and *William, Asinath*, and *Emily*, son and daughters of the said *Charlotte* by a former husband," from *Penryn* to *St. Gluvias*; "and that the grounds and reasons of the said appeal are that the said *Charles Halvoso* was not bound an apprentice" (taking different objections to the removal of *Charles Halvoso*), "and also that the said *William, Asinath*, and *Emily*, the son and daughters of the said *Charlotte*, the wife of the said *Charles Halvoso*, by a former husband, are and each of them is now settled in the said borough of *Penryn*," &c.

The order of removal stated that *Halvoso* and *Charlotte* his wife, "and *William*, now aged about twelve years, *Asinath*, now aged about eleven years, and *Emily*, now aged about seven years, son and daughters of the said *Charlotte* by a former husband, neither of which said children hath gained a settlement in his or her own right, have come to inhabit in the said borough of *Penryn*;" that *Halvoso* and his wife had not gained a settlement there, nor produced a certificate, &c.; and

that

that the five were actually chargeable to *Penryn*; and it adjudged that the settlement of *Halvoso* and his wife was in *St. Gluvias*, and ordered the removal of "the said *Charles Halvoso* and *Charlotte* his wife, and *William*, *Asinath*, and *Emily*, her children, as part of the family of the said *Charles Halvoso*," from *Penryn* to *St. Gluvias*.

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The King
against
The Justices of
Cornwall.

By the examination of *Charlotte Halvoso*, before the justices, it appeared that her former husband "belonged to the said borough," and that neither of the three children "hath done any act to gain a settlement in his or her own right; that the said children are now living with me and my present husband," &c.

When the appeal came on to be heard, the Sessions received the evidence respecting the settlement of *Charles Halvoso*, but refused to hear any evidence against the removal of the children, except so far as depended upon the settlement of *Charles Halvoso*, on the ground that it was not stated in the notice of appeal how the children were settled in *Penryn*. And the order of removal was confirmed.

Sir *W. W. Follett*, in *Easter* term last, obtained a rule calling on the Justices of *Cornwall* to show cause why a mandamus should not issue commanding them to enter continuances and hear the appeal.

Archbold now showed cause. The object of the appellants appears to have been to raise a question on the effect of stat. 4 & 5 *W. 4. c. 76. s. 57. (a)*. They have

(a) Stat. 4 & 5 *W. 4. c. 76. s. 57.* enacts, "That every man who from and after the passing of this act shall marry a woman having a child or children at the time of such marriage, whether such child or

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have proposed to argue that, although the children are part of the second husband's family, they are not removeable with him as such. But the notice of appeal does not raise the question. The eighty-first section of the statute enacts that the ground of appeal shall be stated in the notice. Now the appeal is founded upon the children having a settlement in *Penryn*; but the notice does not state how they are settled there. The

children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly."

Sect. 79. enacts that, after 1st November 1834, "no poor person shall be removed or removeable, under any order of removal from any parish or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed:" unless the overseers, &c., of such latter parish, agree by writing to submit to the order.

Sect. 81. enacts that, after 1st November 1834, "in every case where notice of appeal against such order shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid: provided always, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evidence of any other grounds of removal, or of appeal against any order of removal, than those set forth in such respective order, examination, or statement as aforesaid."

respondent

respondent parish has not the warning which the legislature intended to provide; the settlement proved under such a notice as this might be in the right of the children themselves or in that of their father. There is not enough stated to guide the enquiries of the officers of the respondent parish. The eighty-first section was framed for the purpose of giving to the respondents the same benefit which is given to the appellants by that and the seventy-ninth section, which confine the respondents to the settlement mentioned in the examination. Each party is to have full knowledge of the other party's case. [*Littledale J.* Suppose the settlement stated in the notice were by apprenticeship, and the proof shewed a hiring and service.] In that case the appeal must be discharged. [*Littledale J.* That is a point often of extreme nicety. Lord *Denman C. J.* The order of removal never states how the pauper is settled.] The objection of the appellants is, not that the justices have adjudicated on the settlement of the children wrongfully, but that they have not adjudicated on it at all. But, even supposing the order bad on the face of it, the sessions could not quash it, unless the defect were specified in the notice (*a*). Suppose a notice of appeal against a rate were merely to state that several rateable persons were omitted, without specifying their names; or suppose a notice of appeal against overseers' accounts were merely to state that some sums charged to have been expended had not been expended, without pointing out the items: the appeals could clearly not be allowed. But, again, even if the notice were sufficient, the Court will not grant the mandamus, inasmuch as it is clear that the point in-

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The KING
against
The Justices of
CORNWALL.

(a) *Rex v. Bromyard*, 8 B. & C. 240., in the case of a poor-rate.

tended

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and that, in connection with them, it gives full information. Without putting the question on that ground, we think it better to state that we think the notice sufficient in itself. The appellants say that they mean to dispute the order, on the ground of the children being settled in another parish. That is sufficient to draw the attention of the respondents to the settlement there.

LITLEDALE J. I think this notice sufficient. Under the old law, it was sufficient to give notice of appeal without stating the grounds: such a statement is now made necessary. Formerly there might be doubt as to the nature of the case to be set up: but a notice like the present confines the parties giving it to proof of a settlement in the parish named by them, and is a compliance with the provisions of the act.

PATTESON and WILLIAMS Js. concurred.

Rule absolute.

Thursday,
May 26th.

Ex parte WILLIAMS.

The Court allowed a person who, before stat. 11 G. 4. & 1 W. 4. c. 70., had been admitted an attorney of the

Court of Great Sessions in *Wales*, having paid the higher duty on his articles of clerkship under stat. 55 G. 3. c. 184., to be admitted an attorney of this Court, after the passing of the former act, without examination, though he had never taken out his certificate, nor practised in the Court of Great Sessions or elsewhere.

TYRWHITT applied to admit an attorney of this Court, *Littledale J.* having, at chambers, desired the case to be mentioned to the Court. The party was articulated to an attorney resident at *Rhayader*, having

paid

paid the higher duty on his articles of clerkship (under stat. 55 G. 3. c. 184. *sched. Part 1. Articles of Clerkship*), and was admitted in the Court of the Great Sessions in *Wales* in 1821. He never took out his certificate, or practised on his own account, but acted as clerk to his employer, a relation, till the present time. The application rests on the general power and discretion of this Court to admit an attorney who has paid the higher duty, qualifying him to practise in the superior courts, and is distinguishable from *Ex parte Read* (a), and *Ex parte Garratt* (b), where the question arose on sect. 16. of 11 G. 4. & 1 W. 4. c. 70. s. 16. The applicants in these cases might have paid the lower duty of 60*l.* only, and therefore have sought to practise in the superior courts in *Welsh* causes and no others, under protection of that act. Here the party had paid the higher duty, which would have entitled him to practise in the Courts at *Westminster*. The admission in the *Welsh* Court, in 1821, was tantamount to admission in a Court of *Westminster Hall* (for the abolition of the *Welsh* judicature ought not to operate hardly on parties), in which case the party would be admitted an attorney of this Court as matter of course. [Lord Denman C. J. You apply independently of the statute.]

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Ex parte
 WILLIAMS.
Per Curiam (c),

Application granted.

(a) 1 B. & Ad. 957.

(b) 2 C. & M. 410.; S. C. 4 Tyrwh. 282.

(c) Lord Denman C. J., Littleale, Pattenon, and Williams Js.

1836.

Friday,
May 27th.

EVANS *against* JAMES ELLIOTT, SAMUEL ELLIOTT,
and THOMAS PATRICK.

Replevin for
taking and de-
taining, &c.
Avowry for
rent arrear.

Plea, that, after
the taking and
before the im-
pounding,
Plaintiff ten-
dered the rent
and expenses.

On special
demurrer, for
that the plea did
not go to
the taking but
only to the de-
taining, held a
good plea, the
tortious deten-
tion being a
taking.

REPLEVIN for taking and detaining, &c.

Avowry by *J. and S. Elliott*, and cognizance by
Patrick, for rent due to *J. and S. Elliott*.

Plea that, after the taking of the said cattle, &c., and before the impounding of the same, to wit, &c., the plaintiff tendered and offered to pay to *Patrick*, then being the bailiff of *J. and S. Elliott*, and by them duly authorised to receive the said rent and make the said distress, the said sum of &c., so due for rent, as in the avowry &c. mentioned, together with a certain other large sum of money, to wit, &c., for the costs and expenses of the taking of the said distress, the said last-mentioned sum then being reasonable and sufficient for the costs and expenses in that behalf, which several sums *Patrick* refused to accept, and afterwards unjustly detained the said cattle, &c., against sureties, &c., until &c., in manner and form &c. Verification.

Demurrer, assigning for causes that the plea does not sufficiently traverse, or confess and avoid, the matters in the avowry and cognizance, in this, that it is pleaded to the whole avowry and cognizance, and contains matter in answer only to part, the avowry and cognizance justifying the taking and detaining, and the plea not shewing that the taking was not justified. Joinder.

Evans for the defendants in replevin. The plea is a departure, and does not meet the whole answer to
the

the complaint. If this were a good plea, the plaintiff would get damages for the taking, though he does not answer the justification for the taking. In the *Six Carpenters' Case* (a) it is said, "tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful: tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined." And 2 *Inst.* 107. is to the same effect. [*Patteson J.* You say he should have entered a nolle prosequi as to the taking.] Perhaps that would have been the correct course.

In 2 *Schoyns Nisi Prius*, 1213 (b), it is said, "if the tenant, before distress, tender on the land the arrears of rent, the taking of the distress becomes wrongful, and the tenant may maintain distress for the caption: but if the distress has been made, and before impounding the arrears are tendered, then the *detainer* only is unlawful, and the tenant must bring *detinue*."

E. V. Williams, *contra*. If it be admitted that the plea would have been good, provided the plaintiff had entered a nolle prosequi as to the taking, it follows that replevin, in some shape or other, lies upon the facts on this record. In *Fitzherb. Nat. Brev.* 69 G., it is said, "If a man take cattle for damage-feasant, and the other tender amends, and he refuse it, &c. now if he sue a replevin for the cattle, he shall recover damages only for the detaining of them, and not for the taking

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 EVANS
 against
 ELLIOTT.
(a) 8 *Rep.* 147 a.(b) *Replevin*, viii. 3. 8th edit.

1836.

 EVANS
 against
 ELLIOTT.

of them, for that the same was lawful, and therefore no return shall be." 20 *Vin. Abr. Tender*, (S), pl. 1. shews that replevin lies after a tender made subsequently to the taking. *Gilbert Distr.* p. 85. (4th ed., *Impey's*,) is to the same effect: "Where the lord impounds the beasts notwithstanding the sufficient tender of the tenant, the tenant hath no way to recover his cattle but by his writ of replevin; for if he takes them out of the pound himself, he is liable to an action for breaking the pound: — this puts the lord to his avowry, wherein he must shew the cause of his taking and detention; to which the plaintiff in replevin pleads, that after the taking, and before the impounding, he made a sufficient tender; and thereupon it shall be tried by a jury whether the tender was sufficient, and if it be found so, the plaintiff in replevin shall have damages for such unlawful detention." In *Allen v. Bayley* (a) the decision was that the tender must be averred to be before the impounding; but it was assumed that that would be sufficient: and this was also the principle of *Pilkington v. Hastings* (b) and *Baker v. Johnson* (c). In the *Six Carpenters' Case* (d) it is said, "If a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful." And from *Anscomb v. Shore* (e) it appears that for the impounding after tender replevin is a proper remedy. The only question, therefore, is whether there be informality in the pleadings. It is said that the plea in

(a) 2 *Lutw.* 1594.(b) *Cro. Eliz.* 813. *S. C.* 5 *Rep.* 76 a.(c) 1 *Barnard. K. B.* 309.(d) 8 *Rep.* 146 b.(e) 1 *Campb.* 285.; and in *Banc.* 1 *Trunt.* 261.

bar abandons the complaint as to the taking. No such objection was made in any of the cases cited. But, in truth, the unlawful detaining is a taking; and the plea in bar explains that this is the taking complained of: indeed it may be doubted whether every authority which shews that replevin would lie at all does not shew that there was a taking subsequent to the tender; for it is very questionable whether a taking be not technically essential to replevin. It is clear that trespass lies for removing a distress after tender; *Vertue v. Beasley* (a): there must therefore be a taking. So in the case of larceny there is a taking in every county in which the goods are held by the felon. The replication here is in the nature of a new assignment; note (6) to *Greene v. Jones* (b); the proper method of pleading is to reply the abuse which makes the act unlawful. Even if it could be said that the plea ought more distinctly to have pointed out that the taking complained of is that constituted by the detention after the tender, no judgment on this demurrer could be given for the defendants: for the avowry and cognizance, upon the facts admitted on the record, do not answer the whole complaint of the declaration.

Evans in reply. The plea in bar expressly distinguishes between the taking and the detaining, and shews that a part at least of the taking complained of was prior to the tender. It is laid down in 2 *Inst.* 107. and 2 *Selv. N. P.* 1213 (c), that detainee lies under such circumstances as these it appears also, from the authorities cited on the other side, that trespass lies; but there

(a) 1 *Moo. & Rob.* 21.(b) 1 *Wms. Saund.* 300 d.(c) *Replevin*, viii. §. 8th ed.

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is no instance shewn of replevin for a mere detention: if that could be, there would be a writ for detaining; but no such writ can be cited. Under the rules of *Hil. 4 W. 4.*, *General Rules and Regulations*, 9 (a), this plea in bar is in maintenance of the whole action.

LORD DENMAN C. J. This is a very critical objection; and it seems to me that the plea in bar is good enough. Every unlawful detention is a taking. It is said that the plea in bar distinguishes between the taking and the detention; and the plaintiff might have pleaded that, after the tender, the defendant again took and detained. But I do not see that, even as the plea stands, the taking complained of is necessarily confined to the taking before the tender. The cases show that the damages recovered would be only for such unlawful taking as could be shewn to the jury.

LITTLEDALE J. I am entirely of the same opinion. The detention after the tender satisfies the declaration.

PATTESON J. The authorities cited by Mr. *Williams* show that replevin lies for detaining; and that is as for a new taking.

WILLIAMS J. concurred.

Judgment for plaintiff in replevin.

(a) 5 B. & Ad. v.

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TOMLIN *against* The Mayor, Jurats, and Commonalty of the Town of FORDWICH.

*Friday,
May 27th.*

COVENANT. The declaration stated that plaintiff was possessed for a term of years of a messuage, &c., under a lease from defendants; that, about the period of the expiration of the lease, divers questions arose between defendants and plaintiff, touching a renewal, and the terms of such renewal; that, by articles of agreement between defendants, under their seal, of the one part, and plaintiff of the other, after reciting that, at a Court holden for the said town, at &c., on &c., it was ordered that a lease of the said house, &c., should be offered to the plaintiff for the term of thirty years, to commence &c., at such rent, and upon such other terms and conditions, as should be named by two indifferent persons, one to be named by defendants, and the other by plaintiff, with power for those two to name a third person in case of difference, and also reciting that plaintiff was willing to accept a lease of the said messuage, &c., for the said term of thirty years, and to accede to the terms of the said therein recited order in other respects, so that all questions and differences between defendants and plaintiff in the premises might

Defendant agreed to grant, and plaintiff to take, a lease for a specified term of premises belonging to defendant; and the parties covenanted that the conditions should be named by an arbitrator, so that all questions between the parties might be determined; and they covenanted that all questions between them should be submitted to the arbitrator; that they would perform his award; and that either party, who should neglect to perform the award in all things, should pay 500*l.* as liquidated damages.

The arbitrator awarded that defendant should, within a time named, put the premises in good and tenantable repair to the satisfaction of *M.*, and on a later day named execute a lease to the plaintiff, containing a covenant by plaintiff to keep in repair, and that plaintiff should accept a lease on those terms, and execute a counterpart.

Plaintiff declared in covenant, reciting as above, and averring that defendant had not put the premises in good and tenantable repair to the satisfaction of *M.*, or in any other manner, nor executed a lease on the terms &c., or any other lease. Breach, nonpayment of the 500*l.*

On general demurrer, held a bad declaration, the award being bad as to the delegation to *M.*, and that part not separable from the rest of the award.

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be determined and ended; it was witnessed that, in order to determine and put an end to all the questions and differences as aforesaid, and to prevent litigation, defendants, for themselves, their successors, and assigns, did thereby covenant, promise, and agree, to and with plaintiff, his heirs, executors, &c., and the said plaintiff did thereby, for himself, his heirs, &c., covenant, promise, and agree, to and with the said defendants, their successors, &c., that the said several questions and differences between the said parties thereto, relating to or concerning the matters aforesaid, should be referred and submitted, and they the defendants and the plaintiff did thereby refer and submit the same, to the judgment, award, arbitrament, final end, and determination of *Stephen Elgar* and *George Moss* therein described, or of such third person as they the said *S. E.* and *G. M.* should, in case of their disagreement, by writing &c., appoint: and it was also by the said articles of agreement further witnessed, and covenanted and agreed by the said parties thereto, that the said parties, and each of them, should and would, in all respects, well and truly stand to, obey, abide, perform, fulfil, and keep the arbitrament, final end, and award, or umpirage, of the said *S. E.* and *G. M.*, or of such third person so to be named as aforesaid; and that, if either of the said parties should neglect or refuse to stand to &c., the same arbitrament, &c., in all things, such party should and would, immediately on such neglect or refusal, pay or cause to be paid to the other of the said parties 500*l.* by way of liquidated damages, &c. The declaration then averred that *Elgar* and *Moss* took upon themselves the reference, and, on *September* 9th, 1834, made and published their award, &c., and thereby awarded that
defendants

defendants should, within two calendar months then next ensuing, at their own costs and charges, put the messuage, &c., in good and tenantable order, repair, and condition, to the satisfaction of *James Moyes* of &c.; and they further awarded that the defendants should, on or before 11th *November* then next ensuing, under their common seal, make and execute to the plaintiff, his executors, administrators, and assigns, a good and valid lease of the said messuage, &c. (stating the term for which it was to be demised, and the rent), and they further awarded that in the said lease should be contained the following covenants on the part of the plaintiff, his heirs, executors, &c., viz. to pay the aforesaid rent, &c., to keep the messuage, &c., in good and tenantable repair at all times during the said term, the same having been first put in repair as aforesaid by the defendants, and so to leave the same at the end of the said term, and to insure from fire; with a clause enabling defendants to enter and view, a clause enabling them to enter in default of payment of rent, or of performance of covenants, and a covenant for quiet enjoyment: and *Elgar* and *Moss* did further award, &c., plaintiff to accept a lease of the premises under the terms and conditions aforesaid, and to execute a counterpart. The declaration then averred that defendants had notice of the award, but that they, not regarding &c., did not nor would, within two calendar months &c., or at any other time, put the said messuage, &c., or any part thereof, in good and tenantable order, repair, and condition, to the satisfaction of the said *James Moyes* in the said award mentioned, or in any other manner, but have hitherto wholly neglected and refused so to do; and that, although plaintiff was always,

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from the time of making the said award, ready and willing to accept a lease according to the award, and to execute a counterpart, nevertheless the defendants, well knowing &c. but not regarding &c., did not nor would, on or before the said 11th *November*, or at any other time, make and execute to plaintiff a lease of the said premises for the term, at and under the rent, and subject to the provisoes and covenants, in the said award specified, or any other lease thereof, but have hitherto wholly neglected &c. : by means of which premises defendants became liable to pay the 500*l.* Breach, non-payment.

General demurrer and joinder.

Platt for the defendants (*a*). Assuming that the arbitrators had power to direct the corporation to perform the repairs, the award is not final. It orders that the repairs should be performed, not in any specified way, but to the satisfaction of a third party. This is a delegation of the power of the arbitrators, and therefore, bad; *Com. Dig. Arbitrament*, (E. 15.). It will be said that the 500*l.* was, by the agreement, to be forfeited if either party should refuse to keep the award "in all things;" and that therefore the money becomes due upon the non-performance of so much of the award as is good. But it is clear that the award cannot be separated into independent parts. The lease, the non-execution of which forms the only other breach complained of, is to contain a covenant to repair; and it is impossible to say that this is independent of the state in which the premises were to be put. Neither can the award be supported by rejecting the part which

(*a*) Some points were discussed which are not noticed in the report, the decision of the Court not having been founded on them.

is bad ; for, if so, matter submitted to the arbitrators, of which they had knowledge, will be left undetermined, which will vitiate the award ; *Com. Dig. Arbitrament*, (E 4.), (E 5.).

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G. Hayes, *contra*. No direct authority has been cited which shews that the arbitrators could not order the repairs to be carefully performed, the completeness being to be tested by the approbation of a third party. Had they simply directed that the repairs should be completely performed, the completeness, if disputed, must have been tried by a jury ; it cannot be said that the award is the less final because it names a single party, to save the recourse to a jury. In the instances given in *Com. Dig. Arbitrament* (E. 15.), the authority to make the award itself was delegated or reserved ; but here the party named is merely to judge hereafter of the fact, whether the award shall have been performed. Further, the reference to the third party may be rejected altogether, if illegal. The premises are to be put "in good and tenantable order, repair, and condition, to the satisfaction of *James Moyes*." If all after "condition" be rejected, there will be a perfectly good award. In *Manser v. Heaver* (a) an arbitrator directed certain works to be done by one party, and that, if the other party were dissatisfied with the way in which they were done, evidence might be brought before him the arbitrator ; and this latter part was held bad, but the rest of the award good. It is true that one part of the complaint is the non-performance of the repairs to the satisfaction of *Moyes* ; but the declaration adds "or in any other manner."

(a) 3 B. & Ad. 295.

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LORD DENMAN C. J. The objection is insuperable. We cannot detach the part in question. The only direction as to the repairs is that the premises be put in such good repair as will satisfy the third party, I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other; and each may be varied by the view which he takes of the whole. But here the award is clearly bad.

LITLEDALE J. The award is clearly bad upon this objection, without reference to the other points raised. The clause in question is of the body and essence of the thing, and cannot be rejected. It is true that a good award might raise a dispute as to the fact of performance, which might come to a jury; but the arbitrators could confer no power on a third party.

PATTESON J. In *Manser v. Heaver (a)* the arbitrator directed that the defendants should cleanse out the bed of the stream; but he added, "as I cannot now tell what will be a sufficient cleansing, the parties, in case of dispute, may come before me;" and this latter part of the award was held to be void, but separable from the preceding. Here I do not see how the award can be satisfied without having recourse to the third party named. It is therefore a delegation.

WILLIAMS J. This was an uncertain way of settling one point in dispute.

Judgment for the defendant.

(a) 3 B. & Ad. 295.

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HAYSELDEN *against* STAFF.Friday,
May 27th.

INDEBITATUS assumpsit for (among other considerations) the price and value of work done, and materials provided for the same; promise to pay on request.

Indebitatus assumpsit for work and labour, with promise to pay on request.

Plea (among others), as to non-payment of 1*l.* 0*s.* 9*d.*, parcel of the above, that the said work and materials were work done and materials provided for the same by the plaintiff for the defendant in and about the endeavouring to prevent a certain chimney from smoking, and upon the terms, agreement, and understanding that the plaintiff should not be paid for the said work and materials, or any part thereof, unless he should succeed in preventing the said chimney from so smoking as aforesaid: averment that plaintiff hath not succeeded &c. Verification.

Plea, that the work was done in endeavouring to prevent a chimney from smoking, and on the terms that plaintiff should not be paid unless he prevented it from smoking, and that he had not prevented it. On special demurrer, held bad, as amounting to the general issue.

Demurrer, assigning for causes, that the plea amounts to the general issue, and is argumentative, and an evasive and indirect denial of the cause of action, and does not sufficiently traverse, or confess and avoid it.

The case was now argued (a).

Busby for the plaintiff. The plea, instead of confessing the contract, alleges matter to shew that it never was made as alleged in the declaration: it is therefore bad, and falls within the principle of the cases collected in *Com. Dig. Pleader* (E. 13), and (E. 14.). It is true

(a) Before Lord Denman C. J., Littledale, Patteson, and Williams Js.

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that not only matter in confession and avoidance may be specially pleaded, but also matter of law which may be given in evidence on the general issue. In *Carr v. Hinchliff* (a) the plea was upheld on both these principles. But the present case does not fall within either. The case is the stronger, because here the plea goes to a part only of the consideration; and therefore the unnecessary prolixity, which is the fault against which the rule was intended to guard (b), is aggravated.

Martin contra. The plea is good, whether considered with reference to the new rules, or independently of them. The declaration alleges a performance of work and supply of materials at the defendant's request; and from the fact so alleged it seeks to raise a legal implication of a promise. The general issue would amount to a denial of that fact, and of nothing more (c); but that fact is here admitted: the plea therefore suggests a defence which the general issue would not raise. It is assumed on the other side that a plea in confession and avoidance, to a declaration in indebitatus assumpsit, must confess the debt; whereas it need only confess the fact alleged as the ground of implying the promise. That being confessed, a *prima facie* right in the plaintiff is admitted, which the defendant is to avoid by new matter. Thus, in the new rules of pleading, it is said (d) that, in indebitatus assumpsit for goods sold and delivered, non assumpsit denies merely the sale and de-

(a) 4 B. & C. 547.

(b) See *Warner v. Wainford*, Hob. 127. (ed. 5.).

(c) Rule H. 4 W. 4. *Assumpsit*, 1. 5 B. & Ad. vii.

(d) 5 B. & Ad. vii, viii.

livery in point of fact. Here the plea certainly shews that the contract was conditional: but it lay upon the defendant to allege the condition and deny its performance, as he could not deny the substantive fact. [*Lit-tledale J.* Certainly the new rules so far treat a contract with a condition and without it, as the same thing, that they do not allow separate counts on each (a).] The cases given in the new rules, under *Assumpsit* 3. (b), shew that the special plea need not confess the debt, but only the fact which *prima facie* raises a promise. Thus, coverture, illegality of consideration, unseaworthiness, misrepresentation, concealment, are all matters which shew that the debt never arose; yet they are to be specially pleaded, because they do not deny the fact alleged as the foundation of the debt. In *Potts v. Sparrow* (c) it was held that an objection to an action of assumpsit for the costs of preparing an illegal agreement could not be taken on a plea of non assumpsit, though it was urged that the new rules applied only where the illegality objected to was in the contract, the breach of which was the subject of the action itself. *Edmunds v. Harris* (d) goes much beyond the present case. [Lord Denman C. J. If that decision be correct, no doubt it is an authority in your favour: but some of the other cases put by you are instances of facts de hors the contract, and where, but for such facts, there would be a good contract. Perhaps the rule as to goods sold and delivered is not expressed so correctly as it might be.] Here that has been done for the defendant upon which, but for the matter alleged in the plea, the plain-

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(a) *R. H. 4 W. 4. General Rules and Regulations, 5. 5 B. & Ad. ii.*(b) *5 B. & Ad. viii.*(c) *1 New Ca. 594.*(d) *2 A. & E. 414. S. C. 4 N. & M. 182.*

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tiff would have an implied right to sue. [*Patteson J.* It has been said that the "denial of the sale and delivery in point of fact" means, of the sale and delivery laid in the declaration, that is, a sale and delivery to be paid for on request; and that, if it appear that the payment was to be on a future day, or upon condition, the sale and delivery alleged are negatived; and that therefore such a defence amounts to the general issue.]. The plea here, correctly speaking, does not show that the plaintiff was to be paid only if a certain event occurred, but that his right was to be defeated in case of the non-occurrence of the event: that is not a traverse, but new matter. In *Waddilove v. Barnett* (a) the declaration was in assumpsit for use and occupation; and it was held that the defendant could not, under the general issue, show that after the rent became due he had received notice from a party to whom the plaintiff had mortgaged the premises before the occupation commenced, and that he had paid such party accordingly. [Lord *Denman* C. J. There the defence went to shew that the plaintiff was not the real owner.] That could not have been the principle of the decision; for such a principle would also apply to rent becoming due after the notice from the mortgagee; whereas it was held that, as to this, the defence might be shewn under non assumpsit. The principle was that, as to the last-mentioned rent, the occupation by the sufferance and permission of the plaintiff, which was the fact raising the contract, was negatived by the evidence: as to the rent due before the notice, such occupation was not negatived but admitted; and therefore matter shewing that, though the

(a) 2 New Ca 538.

fact raising the contract was true, still the debt had not arisen, was held not to be admissible in proof under non assumpsit.

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Then, independently of the new rules, this matter might be specially pleaded. It is necessary only that a special plea of this kind should, as this does, give colour to the plaintiff; *Stephen on Pleading*, 421, (ed. 3). *Carr v. Hinchliff* (a) shews this, and proves that a plea does not necessarily amount to the general issue because the defence which it suggests might have been shewn under the general issue. *Bird v. Higginson* (b) is to the same effect. [*Busby*. The Court there did not expressly decide that point. *Littledale J.* They gave judgment for the defendant, though the objection was assigned on special demurrer to the plea. In special actions on the case for disturbance, every one knows that the answer may be pleaded specially]. And that, whether it be by way of confession and avoidance, or by way of raising a question of law. [*Littledale J.* It is said in *Com. Dig. Pleader* (E 14) that this objection should be taken by motion, not by demurrer (c)]. That seems not to be considered law now (d).

Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day of this term (June 13th), delivered the judgment of the Court. After stating the declaration, the plea, and the demurrer, and causes assigned, his Lordship proceeded as follows:—

It must be first considered, whether the defence set up in the plea could be given in evidence under the

(a) 4 B. & C. 547.

(b) 2 A. & E. 696.

(c) Citing *Warner v. Wainsford*, Hob. 127. (ed. 5.), and *Ward and Blunt's Case*, 1 Leon. 178.

(d) See *Stephen on Pleading*, 421. (ed. 3.).

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general issue of non assumpsit; because, if it could not, then there is no ground for the demurrer.

There is no doubt but it might be so before the new rules, because, not only might the fact of the actual contract itself be denied, but also it might be proved that it was void in law, or that the contract itself had been performed, or that the defendant was excused from the performance of it by many other circumstances.

But, since the new rules (and which have the force and effect of an act of parliament), in actions of assumpsit "the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." In actions of assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact. And "in every species of assumpsit all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

One of the general objects of these new rules was to compel a defendant to put his defence specially upon the record. And in conformity with this object the case of *Edmunds v. Harris* (a) was decided. It was an action of debt for goods sold and delivered, to be paid for on request, and which as to this is the same thing as indebitatus assumpsit; to which there was a plea of Never Indebted: and it appeared on the trial that the

(a) 2 A. & E. 414. S. C. 4 N. & M. 182.

goods

goods were sold on a credit which had not expired when the action was brought; and, on a question whether this defence was admissible on the general issue, the Court of King's Bench held it was not, and that it ought to have been specially pleaded, and that it was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor v. Hilary* (a), on the ground that, if the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in the declaration, which was to pay on request. And so also in *Knapp v. Harden* (b) Parke B. considered it as doubtful whether *Edmunds v. Harris* (c) was properly decided. We think therefore that the case of *Edmunds v. Harris* (c) cannot be considered as a binding authority; and, if not, as the defence set up on this record shows a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is that the money should be paid on a certain condition which has not been performed, it is not a contract to pay upon request; and therefore the defence might be gone into upon the general issue.

And in the case of *Waddilove v. Barnett* (d) it was held, in an action for use and occupation, that, under the issue of non assumpsit, the defendant might give in evidence that the plaintiff had mortgaged the premises before the defendant came into the occupation, and that the mortgagee had given notice to the defendant not to pay the plaintiff any rent becoming due after such notice. And this was determined by the Court after considering the effect of the new rules.

(a) 1 Cr. M. & R. 741. S. C. 5 Tyrwh. 373.

(b) 1 Gale, 47. See also *Jones v. Nanney*, 1 M. & W. 333.

(c) 2 A. & E. 414. S. C. 4 N. & M. 182. (d) 2 New Ca. 538.

But,

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But, though the defence might be gone into under the general issue, it does not necessarily follow that the defence may not be specially pleaded on the record.

In the case of *Carr v. Hinchliff* (a) a defence was put upon the record, which, it was admitted, might have been gone into upon the general issue, and yet allowed to be a good plea. It was an action for goods sold and delivered; and the plea was that the goods were sold by a third person as the agent of the plaintiff, with the proper averments of want of knowledge, &c.; and then the defendant set off a debt due from that third person. The question was much considered in that case; but there was, in the first instance, a complete contract admitted by the plea of the *prima facie* liability of the defendant to the action, because, independently of the set off, the defendant would have been liable; there was therefore a confession of the contract stated by the plaintiff; but the plea stated matters which avoided it so far as to exonerate the defendant from the performance of it.

There is a great distinction between the case of a plea which amounts to the general issue, and a plea which discloses matter which may be given in evidence under the general issue. Under the latter, as has been observed in the earlier part of this judgment, the various things enumerated may be given in evidence under the general issue, independently of any of the new rules; but it is incorrect language to say that these things amount to the general issue; they only defeat the contract: but what, in correct language, may be said to amount to the general issue is, that, for some reason

(a) 4 B. & C. 547.

specially

specially stated, the contract does not exist in the form in which it is alleged, and, where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rule of pleading, is not allowed.

The allegation in the declaration is that the defendant is indebted for work and labour and materials, and that, being so indebted, he promised to pay on request. The plea does not confess that the defendant was indebted at all; it admits that work was done, and materials were found and provided: but, instead of confessing that any debt was created by that, and shewing any thing to avoid it, he says that no money was to be paid unless the chimney was cured of smoking, which was not done; and which is really saying, in the most distinct terms, that no debt ever arose, and therefore falls completely within the meaning of what may be termed an argumentative denial of the debt.

In *Solly v. Neish* (a) the declaration was for money had and received. The defendant pleaded that the money was the proceeds of goods pledged to the defendant, with a power of sale, by persons who were allowed by the plaintiffs to hold the goods as their own, and which, in fact, were the property of those persons and the plaintiffs, and that the defendant was willing to set off against the proceeds of the goods the advances made on them. There were subsequent pleadings which led to a demurrer. The Court, though they gave judgment for the defendant, said the plea would be bad on a special demurrer. In *Gardner v. Alexander* (b) the declaration was for goods bargained and sold: the defence was

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(a) 2 C. M. & R. 355. S. C. 5 Tyrwh. 625. 1 Gale, 227.

(b) 3 Dowd. P. C. 146.

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that they were sold under a special contract that they should be shipped within the current month and landed in *London* within a given time, which was not done. On an application to plead several matters, the question was, whether these facts could have been given in evidence under the general issue, or whether it was necessary to plead them specially. The Court of Common Pleas said it was unnecessary to plead them: the special contract might be given in evidence under the general issue. And in *Cousins v. Paddon* (a), in the Exchequer, *Michaelmas* term 1835, it was held that, in debt for goods sold and delivered, and work and labour, the defendant may give in evidence, on the general issue of *Never Indebted*, that the goods were worthless and the work useless.

Upon the whole, therefore, we are of opinion that the plea now before us cannot be supported, and that there must be judgment for the plaintiff.

Judgment for the plaintiff (b).

(a) 2 C. M. & R. 547. S. C. 5 Tyrwh. 535.

(b) See *Gregory v. Hartnoll*, 1 M. & W. 183. S. C. Tyrwh. & Gr. 303. *Jones v. Nanney*, 1 M. & W. 333. S. C. Tyrwh. & Gr. 634. *Grounsell v. Lamb*, 1 M. & W. 352.

Friday,
May 27th.

PAINTER against The LIVERPOOL Oil Gas Light
Company.

This case is reported, 3 A. & E. 493.

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The KING *against* The LONDON Dock Company.Saturday,
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THE Court in this case granted a mandamus calling on the *London Dock Company* to issue a precept to the sheriff of *Middlesex* to summon a jury for the purpose of assessing compensation to *William Hartree* and *Ann Lammiman* under the after-mentioned statute. The company having made a return (a), the Court (by consent) directed the facts to be stated in a special case. The material parts of the case stated were as follows:—

The mandamus recited stat. 9 G. 4. c. cxvi. (local and personal, public) “to consolidate and amend the several acts for making the *London Docks*.” By sect. 2.

The *London Dock Company* were empowered by statute to make a new entrance to their docks, and to purchase houses, lands, &c.; and a jury was to assess (in case of disagreement) the purchase-money to be paid for houses, &c., and the compensation to be made for good-will, improvements, or

for any injury to be sustained by any person interested in houses so purchased. By subsequent sections they were empowered to take down all houses, &c., to be purchased by them under the act, to level the ground, and to stop up all ways on the lands to be purchased (with one exception); to stop or turn any highway interfering with their works, with consent of two justices, &c.; and to provide such sluices, bridges, roads, &c., communicating with the docks and works, as they should from time to time judge necessary. It was then enacted that, if any person having an estate or interest not less than a tenancy from year to year in any houses, lands, &c., should be injured in his said estate or interest by the making of any such cut, sluice, bridge, road, or other work, such person should be compensated by the company for such injury, the compensation to be assessed by a jury in case of disagreement.

The company, acting under the statute, pulled down a number of houses, and made a cut which intercepted several thoroughfares, and obliged those who had formerly used them to take circuitous routes. The tenants of a neighbouring public-house demanded compensation for injury to their estate and interest, inasmuch as the pulling down of premises and the obstruction of access had diminished the resort of persons to the house; and also, as the occupiers of the house were cut off from thoroughfares to the house, formerly used; and thereby the value of the premises to sell or let as a public house or shop, but not as a private residence, was lessened.

Held, that the claimants were not entitled to compensation.

(a) The return, as originally made, recited sect. 84. of the Dock Act (see p. 165. post) as to stopping ways; it then made a short statement of the proceedings complained of, and added, that if the said *W. H.* and *A. L.* are injured by the premises, such injury consists only in this, viz. that the neighbourhood has become less populous, &c., and thereby the number of persons passing to the said messuage may have become diminished, and the profits may have become less, &c., but that *W. H.* and *A. L.* are not injured, save as aforesaid. On motion to quash the return (January 17th, 1835), it was objected that this form was hypothetical and uncertain; and the Court (Lord Denman C. J., *Littledale* and *Williams* Js.), gave leave to amend. The amended return is that mentioned above.

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of that act, the *London Dock Company*, established by stat. 39 & 40 G. 3. c. 47. (local and personal, public), were confirmed and established as a company for maintaining, making, and completing the works in this act mentioned. By sect. 46. they were authorised to make, complete, and maintain in, through, over, across, and upon any lands, tenements, or hereditaments already vested in or belonging to the said company, or which should become vested in them under that act, and the streets, roads, &c., situate within the limits thereof, or in, through, &c., any part thereof, according to such plan and in such manner as they should approve of, an additional entrance to and communication with the said docks from the river *Thames*, at or near *Shadwell Dock*, with basins, locks, cuts, quays, wharfs, warehouses, &c., and other matters and things necessary or proper to carry into effect the purposes of that act.

Sect. 50. empowered the company to treat for the purchase of houses, lands, tenements, hereditaments, &c., mentioned in a schedule to that act, and of such terms and estates therein as they should judge proper to be purchased for the purpose of executing their works. Sect. 54. authorised every tenant in fee, tail, for life, or for years, or other owner or proprietor, as also every tenant at will or from year to year, of any houses, lands, &c., comprised in the above schedule, which should be purchased or taken by virtue of that act, to demand and receive satisfaction from the company for the loss of the good-will of any trade or business carried on upon the premises, and for tenant's fixtures and improvements, and for any other injury or damage which should be sustained in consequence of the execution of the act. Sect. 57. enacted that, if any
owners,

owners, occupiers, &c., or other persons seised or possessed of, or interested in any such houses, lands, tenements, or hereditaments, or any share, estate, or interest therein, should not agree with the company as to purchase-money, compensation, &c., a jury might be summoned by the sheriff on warrant from the company, and should assess the purchase-money or compensation to be given for the entirety or any share of or interest, &c., in such houses, &c., and also should separately assess the compensation, if any, for good-will, improvements, or any injury or damage whatsoever to be sustained by any corporation or person interested therein.

Sections 83. and 84. authorised the company to take down all houses, and other erections and buildings which should be purchased or taken by virtue of that act, and to level and clear the ground whereon the same should stand, and all other the ground to be purchased or taken by virtue of that act, and to stop up, use, and enclose, or alter, all or any of such streets, roads, lanes, ways, courts, alleys, and passages as were situate and lay within the limits of the lands which should be taken or used under the authority of that act, and as were comprised in the first schedule to the said act, save and except that it should not be lawful for the said company to stop up *New Gravel Lane*. Sect. 85. empowered the company, with the consent of two justices, and of the commissioners of pavements, to alter, turn, stop, divert, widen, improve, or cross any road, street, highway, &c., interfering with their works. Sect. 87. enacted, that the company should and might make, provide, and maintain such sluices, bridges, roads, and other requisites, matters, and things on or leading to, or communicating with, the said docks, basins, entrances, and

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works of the said company, as they should from time to time judge necessary for the more convenient use of the said docks, basins, and entrances, and of the quays or wharfs and other works appertaining thereto.

Sect. 89. " Provided always, and be it further enacted, that if any person or persons having an estate or interest not less than a tenancy from year to year in any houses, lands, or hereditaments, shall be injured in his, her, or their said estate or interest, by the making of any such cut, sluice, bridge, road, or other work, every such person or persons shall be compensated by the said company for such injury; and such compensation shall, in case of disagreement, be ascertained by a jury in the manner herein directed for ascertaining the value of premises to be taken by the said company under the authority and for the purposes of this act."

William Hartree and *Ann Lammiman* are the surviving trustees under certain indentures of lease and release (dated the 18th and 19th of *April* 1828), of the fee-simple of a public house called *The Wheat-sheaf*: and *Ann Lammiman* is the occupier and tenant for life of the said public house, and carries on the trade of a victualler therein.

The messuage is included in the first schedule to the act 9 G. 4. c. cxvi., and is situate at the corner of *Star Street*, and of another street called *Lower Turning*. *Star Street* ran to the southward from the premises in question to *Wapping Wall*. *Lower Turning* was carried on to the westward, by a street called *Milk Yard*, to *New Gravel Lane*; and, to the eastward, (before the making of the works executed under this act,) by a continuation called *Brewhouse Yard*, (now destroyed),

to

to another street, forming a further continuation to the eastward, called *Lower Shadwell*. From the line of streets comprising *Milk Yard*, *Lower Turning*, and *Brewhouse Yard* there ran (until the making of the last mentioned works) four streets to the northward; viz. *Farmer Street*, *Shakspeare's Walk*, *Great Spring Street*, and *Fox's Lane*, giving access to carriages and horse and foot passengers, by various lines (described in the case and in a plan annexed) from *Star Street*, and the premises now in question, to *New Gravel Lane* on the west, and *Shadwell High Street* on the north. *Star Street* was a much frequented thoroughfare from *Shadwell High Street*, southward, to *Wapping Wall* and the *Thames*.

The *London Dock Company*, in pursuance of the last mentioned act, purchased lands and a great number of houses and buildings, which they pulled down; and made a new entrance to their docks, consisting of a cut with locks and other works. The cut ran from east to west, to the north of *Milk Yard* and *Lower Turning*, and parallel to them (a), passing opposite to the premises now in question. It was enclosed by a paling which ran at the average distance of twenty-two feet from the north side of those premises. The houses forming the north side of *Milk Yard* and of *Lower Turning* had been pulled down by the company, in execution of stat. 39 & 40 G. 3. c. 47., before 1813: the paling stood in part upon the ground thus left vacant. Two bridges were made over the cut, at *New Gravel Lane* and *Fox's Lane*, and at distances (as appeared by the plan) of 300 or 400 feet, east and west of the *Wheat-sheaf*.

(a) It did not continue in a parallel line to *Lower Turning*, but made a bend to the south east, so that the paling after-mentioned cut off the line of that street on the eastward.

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The consequences of these alterations were stated as follows: — That the premises in question were now confined to only one approach from the north by *New Gravel Lane*; that the Company had, in effect, stopped up *Farmer Street*, *Shakspeare's Walk*, and *Great Spring Street* at their southern extremities, and *Lower Turning* at the east (those streets being intercepted, at the points mentioned, by the cut and paling); and that, by reason thereof, the occupiers of the premises in question could not pass from *Star Street* along *Shakspeare's Walk*, or get into *Farmer Street* or *Great Spring Street*, or approach *Shadwell High Street* through any of those streets, without taking a circuitous route by one of the above-mentioned bridges. And that, in consequence of the pulling down of houses and buildings under the present act, and the destruction of streets, courts, lanes, and allies, the said *Ann Lammiman*, as the occupier of the said public house and premises, “lost several customers who were inhabitants of houses so pulled down, and in the habit of frequenting the said public house, and, by reason of such pulling down of houses, the neighbourhood of *Star Street* is become less populous than it used to be; and, in consequence thereof, and of the stopping up of *Farmer Street*, *Shakspeare's Walk*, *Great Spring Street*, and *Lower Turning*, as aforesaid, and of the destroying of the said direct thoroughfare through *Shakspeare's Walk* and *Lower Turning*, and the indirect thoroughfares from *Farmer Street*, *Great Spring Street*, and *Fox's Lane* to *Star Street* aforesaid, part of the casual and local custom of the said public house and premises has become lost to the said *Ann Lammiman*, inasmuch as no passengers from *Farmer Street*, *Shakspeare's Walk*, *Great Spring Street*,

Street, and *Fox's Lane*, can now pass directly into *Star Street*; and the passengers along *Star Street* from the neighbourhood to the south of the house in question, towards the neighbourhood to the north of the house in question, and vice versâ, have become much less numerous, and by these means the profits of the business carried on by the said *Ann Lammiman* at the said public house and premises have been diminished, and the good-will of the trade or business lessened in value, and the pecuniary value of the said premises, either to sell or to let as a public house or shop (but not as a private residence), is also less." The works in question were necessary for the purposes of the act, and had been carefully and properly done.

If the Court should be of opinion that the injuries above-mentioned, or any of them, entitled the owners and occupier of the said public house and premises to compensation under stat. 9 G. 4. c. cxvi. s. 89., or any other of the provisions of the said acts, a peremptory mandamus was to issue; otherwise the rule to be discharged. The case was argued in last *Easter* term (a).

Kelly, for the claimants. These parties are entitled to compensation, under sect. 89. The act provides, in ample terms, for the satisfaction to be made to persons whose premises are taken; it then, by sect. 89., directs compensation to be made "if any person or persons having an estate or interest not less than a tenancy from year to year, in any houses," &c., "shall be injured in his, her, or their said estate or interest by

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the making of such cut, sluice, bridge, road, or other work." The parties here are tenants in fee and for life. The clause cannot mean that, to entitle such persons to compensation, the quantity of their estate or interest should be diminished. The meaning must have been that they should be indemnified if their estate or interest were rendered of less value. The premises were worth so much to *Ann Lammiman* as her life-estate would have sold for if put up to auction. Suppose that estate to have been of a certain value, as 2000*l.*, before the works now in question were made. By those works the ways leading to the house have been stopped, and the premises, which formerly were in the centre of a populous district, with many thoroughfares, are now isolated: the business is injured, and the saleable value of the premises diminished, perhaps by one half. It was not meant that such an injury should be done without making satisfaction. The company have extensive powers given them, to be exercised for their own emolument, and must be held strictly to the compensations provided by the statute. If they had taken the whole property, they must have paid for it; but the act also provides for the case where the property, though not taken, is deprived of part of its value. It is true that compensation for good-will cannot be claimed, because that is not comprehended in sect. 89., which applies to the present case, though expressly mentioned in sect. 54., which does not extend to this case. But the question is what the claimants here are entitled to in consequence of the premises being worth less money to sell or let as a public-house, supposing that they had not hitherto been one, or as a shop. That is the injury contemplated in sect. 89.: of course it was not

not supposed that the estate or interest of the owner or occupier could be affected in its duration by the company's works. The company, in stopping the highways mentioned in the case, have done that which, but for the statute, they could not have done; and the intention of the legislature was that, in so proceeding, they should not enjoy the protection of the act without making a recompence to the parties injured, and who, if the act had not passed, would have had a remedy by action or indictment. [*Coleridge J.* Suppose, without obtaining an act of parliament, they had bought the soil.] If they had then destroyed the ways over it, the present claimants might have recovered for the particular damage resulting to them, as in *Wilkes v. Hungerford Market Company* (a). There the defendants, in completing some buildings under the *Hungerford Market act*, 11 G. 4. & 1 W. 4. c. lxx. (local and personal, public), had obstructed a highway, not by the buildings which they were authorised to erect, but by a hoard which they kept up for an unreasonable time, and had thereby not only interfered with the public right of passage, but injured the plaintiff in his trade; and on this latter account it was held that he might maintain an action. *Wiggins v. Boddington* (b) shews that, if parties exercising a power given by statute use it excessively and unreasonably, an individual may recover for damage thereby occasioned to him.

If sect. 89. of the act now in question does not apply to the present case, it would be difficult to say precisely what were the injuries against which it was meant to provide; and it might even be contended that, if the

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(b) 3 C. & P. 544.

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cut had been brought close to these premises, and every way to them stopped, no compensation could have been claimed.

Sir *F. Pollock*, *contrà*. It cannot be correct to say that every person who suffers a diminution in the pecuniary value of his estate by the company's works is entitled to compensation under sect. 89. If it were so, then, if, under an act containing such a clause, a new street were built in the same situation relatively to an old one as *Regent Street* to *Bond Street*, an inhabitant of the old street might demand compensation for injury to his estate and interest. So the shopkeepers on the south side of *St. Paul's* churchyard might claim satisfaction under such a clause, if the north side were to be thrown entirely open. [*Patteson J.* Opening a rival way is not the same as stopping up an existing one. Lord *Denman* C. J. The injury there is accidental; here is a direct exclusion from access. *Coleridge J.* No act of parliament would be necessary for the opening. *Patteson J.* There is no right to a monopoly of business on the south side; but here there was a right to the access.] According to the argument for these claimants, the possibility that a man might establish a public house on his land would give him a title to recompence for a diminution of its pecuniary value. The intention in sect. 89. was to guard the company against capricious and unlimited demands, on account of matters in which parties had no vested right, and which formed no part of their estate or interest in the land, like the advantages lost in the supposed cases of *Regent Street* and *St. Paul's* churchyard. Sect. 54. expressly includes every kind of injury or damage; sect. 89. is limited by
the

the words "in his estate or interest;" and the injuries for which it provides are such as accrue "by," and not "in consequence of," the making of any such cut, &c.; and nothing is said there of good-will. Two injuries are alleged here as grounds of the claim; the destruction of buildings and the stoppage of ways. The first head of complaint is clearly within the principle of the decision in *Rex v. The Commissioners of the Nene Outfall* (a), where it was held that a rector could not demand compensation for loss in consequence of land being made no longer productive of tithe. No injury is done here to the estate in fee, or for life. The property is not said to be damaged, except as a public house; and injury in that respect can be only matter of good-will. As to the stopping of ways, a party sustaining damage individually by that proceeding, if it be not authorised by law, may maintain an action, as where a ditch is made across the way, by which a man's leg is broken; but his right in that respect does not depend upon his having a house in the neighbourhood. The way is no part of his estate or interest in his house; otherwise every person who had been accustomed to go through the highways in question from his house, wherever situate, might complain of an injury to his estate and interest in such house. The intention in sect. 89. was to give a remedy where the company's works came near enough to do the house some direct mischief, and to interfere with the occupation; as if the foundation be undermined, the party wall injured, a private way obstructed, or the light interfered with, or if a steam-engine be erected so near as to create a

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nuisance; in all which cases the person is injured in his private estate, and not in his rights as one of the public, or in rights which are merely personal. Sect. 84. enables the company to stop up ways within the limits of the lands to be taken by them; and it adds nothing on the subject of compensation to those who may consequently lose their rights of way over land not taken. It is not reasonable to suppose that the remedy omitted in this clause, is given indirectly by sect. 89. *Wilkes v. Hungerford Market Company* (a) is distinguishable from the present case, because the defendants there had done something not authorised by the statute under which they were acting. Here, the company have merely used the powers given them by the legislature; the complainants had an opportunity of opposing the grant of such powers when the bill was before parliament.

There is no ground for presuming, in the absence of express words, an intention in the framers of the statute to exact this compensation from the company for either of the kinds of injury here alleged. Their works are for the advantage of the revenue and the general improvement of the port of *London*, and not, therefore, on the footing of a mere private speculation. Where the legislature has intended to give remuneration for a decrease of profits, consequent upon the establishment of a new undertaking, the enactments have been very careful and specific, as in the *West India Dock* act, 39 G. 3. c. lxix., (local and personal, public,) s. 121., where compensation is given to the owners of certain legal quays and sufferance wharfs, &c., to ticket porters, free carmen, &c., of the city of *London*, and to the

(a) 2 *New Ca.* 281.

governors of *Christ's Hospital*, in case of their receipts being diminished by the new docks; and in the *London Dock act*, 39 & 40 G. 3. c. xlvii. s. 109., which contains similar provisions. And the rule of the Houses of Parliament is not to allow compensation for a general loss of custom occasioned by improvements in a district.

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Kelly, in reply. The principles which govern the Houses of Parliament in passing acts of this kind cannot be noticed by the Court. [Lord Denman C. J. I think they cannot. We are not acquainted with them.] No demand is made here for good-will, which is a value given to premises by a long established business: here the claim is for diminution of that value which the premises might have as a public house if they had not before been one, or as a shop, which they have not yet been. It is no answer to such a demand to say that they are not diminished in value as a private residence. It does not follow, because sect. 84. gives power to stop ways and says nothing of compensation, that none is given by any subsequent clause for injuries occasioned by that proceeding. Sect. 54. provides compensation for things done under previous sections in which no reference to compensation occurs. The intention of the act is to give a remedy to the parties affected in all instances where the thing done would have been actionable if not legalised by the statute; and there is no ground for limiting the remedy to cases where the occupation is rendered uncomfortable. In *Rex v. The Commissioners of the Nene Outfall* (a), where the rector was held not entitled to compensation for loss of tithes, Bayley J. and Parke J. observed, in the course of the

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argument, that, if no statute had passed, and the land-owner had turned his land into a canal, the rector would not have had any cause of action against him. In the supposed case of *Regent Street*, no compensation could be recovered, because, in the absence of any statute, the making of the new street would not have given a cause of action to the inhabitants of the older one. [Lord *Denman* C. J. The words of sect. 89. are, "if any person or persons" "shall be injured in his, her, or their said estate or interest by the making of *any such* cut, sluice, bridge, road, or other work." Does not that refer to the works in the preceding sections (a) after sect. 84. ?] It applies to the work generally. The whole work is a cut. [*Patteson* J. Sect. 89. says "*if*" any person shall be injured; but according to this argument there could be no contingency, for the making of the whole work must necessarily inflict an injury on the neighbourhood in general. As the case is put for the claimants, every person in every one of the streets which have been referred to sustains an injury.] That may have been contemplated by the legislature. Every person carrying on trade in this neighbourhood does in fact suffer an injury (leaving good-will out of consideration) by his premises being rendered less valuable for the purposes of trade. [*Patteson* J. According to your argument I should have expected a clause of compensation to every person carrying on trade in this neighbourhood.]

Cur. adv. vult.

(a) Sect. 86. (not stated in the case) gave powers to stop up and alter sewers and drains, and make new ones, under the direction of the Commissioners of Sewers. Sect. 88. added a proviso, not material. For sects. 85. and 87., see p. 165., ante.

Lord

Lord DENMAN C. J. now delivered the judgment of the Court.

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The question raised on this return is, whether the company, in making certain works authorised by the 9 G. 4. c. cxvi., are made liable by the 89th section of that act to compensate the complainants for the consequential injury resulting therefrom to their property.

Before adverting to the words of the clause, it is proper to state distinctly the injurious consequences alleged to have arisen from the acts of the Company. These are the destruction of neighbourhood by the formation of the basin and cut on ground before covered by houses, and the stopping up of several public thoroughfares, which gave a direct passage to and from and by the house in question. By these acts the case finds that the direct and casual custom of the premises is diminished, and their pecuniary value to sell or to let, as a public house or shop, but not as a private house, is less.

The 89th section is as follows. (His Lordship then read it).

The question upon these words is, Have the company, by the making of the cut, sluice, bridge, road, or other work, injured the complainants in their estate or interest in these premises? In the argument for the affirmative, much stress was not laid upon the loss of neighbourhood; indeed it is clear that the company, having become the lawful proprietors of the site, had full power to pull down the houses, to keep it uninhabited, or turn it to any use not a nuisance to the public or to individuals, which yet might deprive the tradesmen in the vicinity of many advantageous customers. It was conceded also that an injury merely

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to the good-will of the premises as a public house was not, as a substantive injury, within the words of the section; but it was alleged that the stopping up of any public way, by which the owner or occupier, or his customers, local or casual, had the most convenient and direct communication with his house, and the compelling them to go by a circuitous, or less convenient route, was an injury to such owner or occupier in his estate and interest in such house; and, that being so, the amounts of the usual resort before and since the act of stopping, might be considered as shewing the quantum of damage sustained. In support of this argument, the case of *Wilkes v. Hungerford Market Company (a)* was relied on.

We see no ground to impeach the authority of that case; but it has no bearing on the present. There the act producing the injury was unauthorised by any statute for the period complained of; it was a public nuisance, which might have been indicted; and *that* was the difficulty cast upon the plaintiff, to which a sufficient answer was given by shewing that *the* specific injury of which he complained was one felt by him alone, and beyond the common and public nuisance. Here the act is in its full extent authorised; there is no public nuisance; and, if the injury by loss of trade be put out of the question, there is no private inconvenience sustained beyond the public. It is distinctly stated that it is only “*to sell or to let as a public house or shop,*” in other words, in respect of its good-will, that the pecuniary value of the house is diminished.

We must however decide this question on the words of

(a) 2 New Ca. 281.

the section, calling in aid of course the other provisions of the act. And, so considering it, we are of opinion that the case of the complainants is not brought within any reasonable construction of the section. The inconvenience they complain of is not only one common in a greater or less degree to every inhabitant in the neighbourhood, but it is the *necessary* consequence of the lawful act done by the company. It was impossible to make the basin and cut, which it was the very object of the statute to enable the company to make, without destroying the neighbourhood, and stopping up these thoroughfares. This necessary consequence must have been foreseen; and, if it had been intended to give any compensation for it, considering its very large and indefinite extent, it is hardly to be conceived that language should have been used so hypothetical, and so vague in its meaning, as the language of the eighty-ninth section would be, if extended as the argument of *Mr. Kelly* requires.

But the language of the section is apt, and its hypothetical form proper, if we read it as intended to provide for the contingent and unforeseen, but direct injury, which might or might not be occasioned by some positive act of the company, as if by their cut, or bridge, or any other work, they had weakened the foundation, darkened the lights, stopped the drains, or done any similar injury to the houses, lands, or hereditaments of any person having an estate or interest not less than a tenancy from year to year, the object of which limitation plainly appears to have been to exclude the vexatious claims likely to be made by persons having no permanent interest, on account of trifling

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inconveniences which might be sustained in the progress of the works.

Upon the whole we are of opinion that the claim cannot be sustained, and that the return to the mandamus is sufficient.

Rule discharged.

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Neither husband nor wife can be examined for the purpose of proving non-access during marriage.

Nor can either be examined as to any collateral fact, for the purpose of proving non-access. As, that the husband, at a particular time, lived at a distance from his wife, and cohabited with another woman.

ON appeal against an order of two justices, whereby *Ann Tickle Soper*, spinster, was removed from the parish of *Lamerton* in the county of *Devon* to the parish of *Sourton* in the same county, the sessions confirmed the order, subject to the opinion of this court on a case which was stated as follows:—

The respondents proved the birth of the pauper, twenty-five years ago, in *Sourton*, and there rested their case. The appellants called *John Tickle*, who proved that he had been married to the pauper's mother in *Sourton*, seven or eight years before the pauper was born; which was further proved by an examined copy of the marriage register: he then proved that he had since gained a settlement by renting a tenement, which he had occupied about twenty-five years, at *Clifton*. The respondents relied on proving the non-access of *Tickle* and his wife, and thereby the illegitimacy of the pauper. They called one *Soper*; and, partly from his evidence, and partly from the cross-examination of *John Tickle*, the sessions found the following facts:—That the mother's general residence for a year previous to the birth

birth of the pauper was in *Sourton*; that the pauper went by the name of *Ann Tickle*, though she was called *Ann Tickle Soper* in the order of removal; that *Tickle* had removed from *Sourton* to *Clifton* (a hundred miles distant) about five years before the pauper's birth; and that his general residence from that period to the present had been at the latter place. It further appeared, from the cross-examination of *Tickle*, that during his residence at *Clifton* he had been living in incestuous intercourse with his wife's sister, who had borne him children. The sessions were satisfied with the proof of non-access, if they were right in admitting the evidence of *Tickle*, without which they had not sufficient grounds to find the fact of non-access. If that evidence was inadmissible, the order was to be quashed; if it was admissible, the order was to be confirmed.

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Praed, in support of the order of sessions (*a*). It has been said that, in a case of disputed legitimacy, the fact of non-access shall not be proved by the husband or wife: but there is no authority to shew that a husband may not prove facts tending to establish non-access. It is not shewn that the witness *Tickle* did more in this case. The sessions drew their inference from all the facts brought before them. [Lord Denman C. J. They do not profess to set out all his statement; and there does not appear to have been any thing from which they could infer the fact of non-access, unless it was distinctly stated in his evidence; for the husband and wife were within reach of one another

(a) The argument on this case was begun May 4th, but adjourned.

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during the time in question (a).] Although access (in the sense of sexual intercourse) might be presumed from that circumstance, the sessions were at liberty to form their conclusion from all the facts. The opinion delivered by the Judges in the *Banbury Peerage Case* (b) was that the proof, to refute evidence of access, must be regulated by the same principles which are applicable to the establishment of any other fact; and that it was to be left to the jury, upon such proof, whether or not the husband was the father of the child. In *Goodright dem. Thompson v. Saul* (c) the Court thought that a child born in wedlock might be proved illegitimate by circumstances which fell short of demonstrating that the husband could not have had access. Here, *Tickle* stated only facts which might lead the Court to the conclusion of non-access; and the question is, whether they were at liberty to attend to any thing that he proved. The reason which has been alleged for excluding any evidence of the wife on this subject, namely, that she shall not bastardize her own issue, does not apply to the husband; since the issue, if a bastard, is not his. But the limit of the rule, as to either party, must be, that, where access might, in an ordinary case, be presumed, such party shall not be allowed to state directly that none took place. [*Patteson J.* You would have allowed the husband here to say that, during a certain period, he never left *Clifton*, and the wife to say that, during the same time, she

(a) *Crowder*, who opposed the order of sessions, admitted, at a subsequent period of the argument, that the question as to non-access was not put directly to the witness.

(b) 2 *Schw. N. P.* 749, 750. 8th ed. *Le Marchant's Case of the Barony of Gardnerr*, Appendix, Note (E), p. 433—436.

(c) 4 *T. R.* 356.

never

never went out of *Sourton*. But that is direct proof of non-access.] The general rule must be, that each party may prove facts from which non-access may be presumed; and the sessions, or jury, may infer it or not as they think proper. It has been decided, where legitimacy was in question, that the reputed husband or wife might, on some points, give evidence for or against it. Either may prove the supposed marriage invalid; *Rex v. Bramley* (a), *Standen v. Standen* (b): and in the latter case, where, after evidence given by the husband to impeach the marriage, the jury found for the party whose title depended on its validity, Lord *Thurlow*, who had directed the issue to try that fact, was dissatisfied with the verdict; *Standen v. Edwards* (c). Lord *Mansfield* lays it down, in *Goodright dem. Stevens v. Moss* (d), as "a rule, founded in decency, morality, and policy, that" the father and mother "shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." There is no authority, except such as this dictum may furnish, for excluding the testimony of the father; and clearly the rule of decency does not prevent either party from proving facts from which non-intercourse may be inferred. In *Rex v. Bedel* (e), though it was agreed that the wife ought not to have been allowed to prove the very fact of non-access, it is nowhere laid down that her evidence was not to any extent admissible. In *Rex v. Reading* (g) it was held

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(a) 6 T. R. 330.

(b) *Peake, N. P. C.* 32.

(c) 1 Ves. jun. 133.

(d) 2 Cowp. 594.

(e) *Ca. Temp. Hardw. K. B.* 379.(g) *Ca. Temp. Hardw. K. B.* 79. See *Bull. N. P.* 113. Note (a) to *Rex v. Luffe*, 8 East, p. 196.

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that the wife's evidence was not admissible to prove the non-access of her husband, though she might prove an intercourse between herself and another man, such intercourse being a fact within her own particular knowledge, and probably not capable of being established by other evidence. In the same manner *Tickle* might be admitted in the present case to prove the intercourse between himself and his wife's sister, even though he might not be at liberty to prove that he had no access to his wife. [*Patteson* J. The proof of intercourse with the sister shewed merely an access to a woman having no relation to the child whose legitimacy was in question: the connection proved by the wife in *Rex v. Reading* (a) was with a man who might have been the father of her child.] That was not necessarily the reason for admitting her evidence. The fact proved by her might tend to shew that she was a woman of ill fame, and that the access of her husband at the time in question was therefore less probable.

In *Pendrell v. Pendrell* (b), as stated in *Bull. N. P.* 113, "Lord *Raymond* would not suffer the wife's declaration, that she should not know her husband by sight, &c. to be given in evidence, till after she had been produced on the other side; the fact of the marriage not being disputed, but only the legitimacy. In the same case the Chief Justice admitted evidence to be given of the mother's being a woman of ill fame. The declarations of the wife without oath were properly rejected in that case, because they were not the best evidence. The husband was dead, and she might be

(a) *Ca. Temp. Hardw. K. B.* 79. See *Bull. N. P.* 113. Note (a) to *Rex v. Luffe*, 8 *East*, p. 196.

(b) 2 *Str.* 925.

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examined. *Strange* says, that the Chief Justice would not allow the wife's declarations to be given in evidence, till she had been called, and *denied them on cross-examination*. — After that they were evidence to impeach her credit. — The reason here given, *viz.* 'because the fact of the marriage was not disputed, but only the legitimacy,' is not mentioned in *Strange*." In the present instance, *Tickle* was called to support the *primâ facie* case of legitimacy; then, on cross-examination, certain facts were drawn from him (like the evidence to contradict the woman in *Pendrell v. Pendrell (a)*) tending to impugn the legitimacy. He was clearly a good witness to prove the child legitimate, or at least born in wedlock; and, upon his giving such evidence, the respondents were entitled to cross-examine upon it, and could not be prevented from asking (not perhaps in direct terms whether he had had access to his wife at a particular time, but) whether he was not, at that time, a hundred miles distant. Suppose, in any other case, a witness were asked a question in the course of examination; could he decline answering it, on the ground that he might be asked something in cross-examination which would tend to bastardize his child by shewing that he was absent when the child was begotten? [Lord Denman C. J. If the witness were *bonâ fide* called with a view to some distinct point in the cause, the case might be different; but here it does not appear how the evidence could be relevant, unless with reference to the question of access].

In the cases where evidence by the wife has been objected to, the objection has been, that the illegitimacy ought not to be established by her testimony *alone*. In

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Rex v. Reading (a) it is said that the wife is not competent "to prove the whole fact;" and the orders of sessions are held to be faulty, because "the wife is the only evidence to prove the absence and want of access of her husband." So in *Rex v. Rook* (b) it is said that a wife "shall not be admitted to prove that her husband had no access, because that may be proved by other persons, and an order of bastardy could not therefore be made upon her oath alone." And in *Goodright dem. Stevens v. Moss* (c) it was held to be quite clear that the mother might be examined as to the time of the birth, though her evidence on that subject tended directly to bastardize the issue: the rule of decency and morality, afterwards laid down, is confined to the fact of connection: collateral circumstances may be proved by either parent. There could not be any objection to *Tickle's* proving the fact of his absence from *Sourton* at a certain period, though, when coupled with proof as to the birth of the child, it afforded proof of non-access by him at the time when the child was begotten. [*Patteson J.* It will not be disputed that the parents may bastardize their issue by any evidence except of non-access]. In *Rex v. Luffe* (d), where an order of justices was made concerning a bastard child, born *July* 13th 1806, of *Mary Taylor*, and the order stated that it appeared to the Justices, "upon the oath of the said *Mary Taylor*, as otherwise," that she had not had access to her husband from *April* 1804 till *June* 1806, this Court held the order maintainable on the supposition that *Mary Taylor* was not the only witness

(a) *Ca. Temp. Hardw. K. B.* 82. See *Bull. N. P.* 113. Note (b) to *Rex v. Luffe*, 8 *East*, p. 195.

(b) 1 *Wils.* 340.

(c) 2 *Cowp.* 591.

(d) 8 *East*, 193.

called.

called, and that she was examined "only as to those facts which she was competent to prove." In the subsequent case of *Rex v. Kea* (a), which may be cited on the other side, it would seem that the wife's evidence (the reception of which was held to vitiate the order of sessions) went to the very fact of non-access. Here, the whole of *Tickle's* evidence, as stated in the case, would not, by itself, have demonstrated that fact.

There is a recognised distinction between evidence proving a fact, and evidence tending to prove it. It was held in *Rex v. Cliviger* (b) that a wife could not give testimony even tending to criminate her husband; but that doctrine was questioned in *Rex v. All Saints, Worcester* (c); and in *Rex v. Bathwick* (d) it was held that the tendency to criminate is no objection to the wife's evidence where there is no direct charge or proceeding against the husband. The wife, according to that case, might, on the trial of an appeal, give evidence tending to shew that her husband had been guilty of bigamy; for neither her statement at the sessions, nor the decision there, could have been received in support of an indictment against him for that crime.

Crowder contra, was stopped by the Court.

LORD DENMAN C. J. It is desirable to shew, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule, cited in 2 *Starkie on Evidence*, p. 139, note (x), (2d ed.), from *Goodright*

(a) 11 *East*, 132.

(b) 2 *T. R.* 263. *Littledale and Coleridge* Js. referred to *Hood's Case*, 1 *Moody's C. C.* 281., and *Smith's Case*, *Ibid.* 289.

(c) 6 *M. & S.* 194.

(d) 2 *B. & Ad.* 639.

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dem. Stevens v. Moss (a) (supported also by *Rex v. Kea (b)*, cited in the same note,), is that parties shall not be permitted after marriage to say that they had no connection. Then, it being clear and indisputable law that, for the purpose of proving non-access, neither husband nor wife can be a witness, the question is whether the circumstances of the present case bring it within that rule. I wish the statement sent up to us had been clearer; but it is impossible not to see that the husband, being called for a different purpose, was cross-examined directly for the purpose of proving non-access. It is not necessary to say that, if he had been asked the questions that were put to him with a different object, the answers would not have been evidence: but, when he was asked where he lived at a particular time, with the avowed purpose of proving the fact of non-access, the rule prohibiting such inquiry became applicable. The sessions have expressly said that they are satisfied with the proof of non-access if they were right in admitting *Tickle's* evidence, without which it was not sufficiently proved. They have, therefore, admitted the husband to prove what, by a rule of law, clear and undoubted and of obvious public utility, they could not receive as evidence from him. The order of sessions must be quashed.

LITLEDALE J. I agree in the rule cited in 2 *Starkie on Evidence*, from *Goodright dem. Stevens v. Moss (a)*, that neither the wife nor the husband ought to be admitted to prove non-access. It may be a question whether the rule, as laid down, goes to anything more than the case of a party being put into the witness-box and distinctly asked the question. But I think that it

(a) 2 *Cowp.* 591.(b) 11 *East*, 132.

does

does extend farther, and excludes all questions which have a tendency to prove access or non-access. Suppose, in a dispute respecting legitimacy, it were an issue directed by the Court of Chancery, whether the husband and wife had or had not access to each other at such a time: I should say that neither of them could answer any question having a tendency to prove the negative or affirmative of that single issue. Here, the question was as to residence; but the avowed object was to prove non-access. It is not stated that the evidence was material for any other purpose; and the sessions say that they are satisfied with the proof of non-access if *Tickle's* evidence was rightly received. I give my opinion on the ground that the object of the cross-examination was to prove non-access; and I think that the evidence was as much inadmissible as if the question had been put, whether or not the parties had had any connection.

PATTESON J. It is much to be regretted that this case is stated so as to render it difficult to say what the sessions meant to submit. It seems, however, that they meant to ask, whether the evidence of *Tickle* was admissible for the particular purpose of proving non-access. For some purposes it was no doubt admissible. In this, as in most settlement cases, there were many issues: on the marriage; on the birth; on *Tickle's* settlement elsewhere than at *Sourton*. Upon his examination in chief, he proved that he had rented a tenement at *Clifton* for twenty-five years. That was legitimate proof by him of a fact in the appellants' case. But then he was cross-examined; and, the question of access being distinctly raised, he was asked questions tending directly to prove the want of access. It is trifling to say that all inquiries may

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may be made of the witness, close up to the point of access or non-access, so that, by a variation of terms, the direct question on that subject be avoided. Whether the investigation arise upon an issue out of Chancery, or whether it be raised as it was in the present case, the question as to access is not to be asked at all in examining the husband or wife. If the witness here was not examined with a view to this point, but to one of the other issues in the case, — and something which he stated, and which was relevant to that issue, operated also upon the question of access, — the sessions ought to have stated that to us.

WILLIAMS J. It would have been desirable that this case should have been sent back to be more fully stated. But from the statement of the sessions that, without *Tickle's* evidence, they had not sufficient grounds to find non-access, I conclude that he was examined with the intent of proving that fact by his evidence. And then it results from all the authorities, beginning with *Rex v. Reading* (a) (except so far as a doubt is thrown upon it in Mr. *Nolan's* treatise (b)), that non-access is a fact not to be proved by the husband or wife. As, therefore, *Tickle's* evidence was received with a view to the proof of that fact, it was inadmissible.

Order of sessions quashed.

(a) *Ca. Temp. Hardw. K. B.* 79. See *Bull. N. P.* 113. Note (a) to *Rex v. Luffe*, 8 *East*, p. 196.

(b) See 1 *Nol. P. L.* 334. note (5), (ed. 4), citing *Clerk v. Wright*, 1 *Bott*, 438. pl. 496. 6th ed.

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The KING *against* The Inhabitants of WITNEY. *Saturday, May 28th.*

ON appeal against an order of two justices, removing *James Price* from the parish of *Saint Clement* to the parish of *Witney*, both in the county of *Oxford*, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

By stat. 11 G. 3. c. 14., for better regulating the poor within the city of *Oxford*, the mayor, recorder, aldermen, assistants, town clerk, and solicitor of the said city, for the time being, and also certain persons to be elected in manner therein-mentioned, are incorporated by the name of “The guardians of the poor within the city of *Oxford*.” And, by sect. 16, power is given to the guardians, at any monthly or special court, by writing under their common seal, to bind and put forth any of the poor children to be maintained by them under that act (at the age of fourteen, or sooner if they think fit) apprentice to any reputable person in England: and it is declared that every such writing shall be binding as an indenture, and shall entitle the apprentice to a settlement, and shall in all respects be enforced according to the laws in force concerning the binding out of poor children apprentices.

On the part of the respondents, a deed of apprenticeship, under the common seal of the guardians, was put in, dated 7th *March* 1822. The indenture was set out in the case: it referred to the act, and it stated that the

Under stat. 56 G. 3. c. 139. s. 2. and stat. 8 & 4 W. 4. c. 63. s. 1., where a district has justices of its own, not exercising jurisdiction in the rest of the county, and the county justices have a concurrent jurisdiction with them within the district, an indenture, binding a parish apprentice by the officers of the district, to serve in the county, without the district, may be allowed, and the order made, by two of the county justices.

On an appeal respecting a settlement under such indenture, if the indenture and allowance do not mention that notice to the officers of the parish where the apprenticeship is to be served was proved or admitted before the justices at

the time of allowing and executing the indenture, and no evidence be given either to prove or disprove the fact, the presumption is, that such notice was proved or admitted.

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guardians, "by and with the consent of his Majesty's justices of the peace *for the county of Oxford*, whose names are hereunto subscribed, and by virtue and in pursuance of an order in writing made by and under the hands and seals" of *W. H. A.* and *J. P.*, Esquires, "justices of the peace *in and for the said county*," dated 2d March 1822, pursuant to the statute in that case &c., had, at their monthly court, &c., and pursuant to the powers, &c., vested in them by the act of 11 G. 3. c. 14., put forth, and by that present writing did bind and put forth, *James Price* (the pauper), a poor child, maintained by the said guardians, and then under their government, aged fourteen years or thereabouts, apprentice to *Thomas Harris*, of *Witney* in the county of *Oxford*, watchmaker, &c., with him to dwell and serve from the day of the date of the indenture, till he should attain the age of twenty-one.

The original order of the two justices of the county of *Oxford* for the binding was annexed to the above indenture; and, at the foot of the indenture, appeared an allowance of the apprenticeship, signed and sealed by the same two justices, which allowance was set forth in the case; it was dated 2d March 1822, and purported to be made by the underwritten "justices of the peace acting *in and for the county of Oxford*."

The deed of apprenticeship was not allowed by any other than the said two justices, who were justices of the county of *Oxford* (and whose jurisdiction, as after explained, overrides the city), but not justices of the city of *Oxford*.

The city of *Oxford* has justices of its own, under the authority of two several commissions issued under the great seal, one being a commission of gaol delivery,
and

and the other of the peace, and which are severally directed to certain noblemen and gentlemen of the county, and to the mayor, recorder, aldermen, and assistants of the city: but the administration of justice under such commissions has hitherto been conducted by the mayor, recorder, aldermen, and assistants of the said city only: and they also have alone been accustomed to qualify as justices for the city. The justices of the county of *Oxford*, however, have a concurrent jurisdiction in the city of *Oxford*, excepting only within that small part of it which is in *Berkshire*, where the justices of that county have a like concurrent jurisdiction.

It did not appear by the deed of apprenticeship, or any indorsement thereon, nor was it made to appear at the hearing of the appeal, that any notice of the apprenticeship had been given to the overseers of the appellant parish, or that any overseer of the appellant parish had attended before the justices and admitted such notice. The execution of the deed by the said guardians, by affixing their common seal, was proved by the attesting witness, the then clerk to the guardians: but no evidence was given by the respondents with respect to the notice. The pauper served more than forty days in *Witney*, under the apprenticeship deed. The questions for the opinion of the Court were, —

1st. Whether the order for the apprenticeship ought not to have been made by justices of the city of *Oxford*?

2dly. Whether there ought not to have been an allowance of the indenture by justices of the said city?

3dly. Whether, under the circumstances, it was incumbent on the respondent parish to prove that notice of the intended apprenticeship had been given to the

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appellant parish of *Witney* before the allowance of the indenture, or that an overseer of that parish had attended before the allowing justices, and admitted such notice?

Maule and *Cooper* in support of the order of sessions. The first and second questions turn upon the same point. Stat. 56 G. 3. c. 139. s. 1. enacts that, "before any child shall be bound apprentice by the overseers of the poor of any parish, township or place, such child shall be carried before two justices of the peace of the county, riding, division or place wherein such parish," &c., "shall be situate;" and the justices, after certain enquiries, if they think proper, are to make the order, and afterwards sign the allowance: and, by sect. 2., "in all cases where the residence or establishment of business of the person or persons to whom any child shall be bound, shall be within a different county or jurisdiction of the peace, from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound" "shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve." Here the binding is by the officers of the poor

poor within the city of *Oxford*, and the place of business of the person to whom he is bound is in the county of *Oxford*. But it appears from the case that the county justices have jurisdiction in the city as well as the rest of the county; and they are therefore justices, as much of the part of the county in which the city lies, as of the rest. Sect. 3. provides that the allowance of two justices of the county in which the apprentice is to serve shall be sufficient, though the place in which he is to serve be a place of exclusive jurisdiction: and this at least shews that the general policy of the act was to give the power to the county magistrates. As to the notice, sect. 2. provides that "notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice." It is true that the notice is essential to the settlement; and, if the case had actually found that no notice was given, or proved, or admitted before the justices, the order of sessions must have been quashed; *Rex v. Threlkeld* (a). But here the question is, whether, in default of proof either way, the Court must not presume all to have been properly done. Thus the consent of parents to the apprenticeship need not be proved; and, where a settlement depended on a marriage, it was held unnecessary to prove the publication of banns; *St. Devereux v. Much Dew Church* (b). A counter-presumption might indeed be

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(b) 1 W. Bl. 367.

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raised, as in *Rex v. Haslingfield (a)*. No inference can be drawn from the fact that the indenture does not mention the notice: sect. 1. enacts that the order shall be referred to by the indenture; but there is no provision that the notice shall be referred to. The objection, if good at all, would be good where the indenture had been executed twenty years back. [*The Court* referred to *Rex v. Whiston (b)*.]

Chilton contra. As to the question of jurisdiction, it is true that, by stat. 3 & 4 W. 4. c. 63. s. 1., an allowance by two justices "acting" both for the district in which the place, of which the parties binding are officers, is situated, and also for the district in which the service is to be, is sufficient, whether the indenture has been allowed before or after the passing of the act. That was enacted to remedy the consequences of the decision in *Rex v. Shipton (c)*, where it was held that, whenever the districts were different, there must be an allowance by four justices, two of one district, and two of the other. But here there has been no allowance by justices of the district within which the place, of which the binding parties are officers, is situated. The county magistrates cannot be said to be justices of the city of *Oxford*: there are clearly two different jurisdictions, though one is not exclusive. It cannot be said that the county justices are justices "acting" "for" the city: therefore stat. 3 & 4 W. 4. c. 63. s. 1. does not apply; and the case falls within *Rex v. Shipton (c)*. Sect. 3. of stat. 56 G. 3. c. 139. is not applicable; though it would be, if the

(a) 2 M. & S. 558.

(b) 4 A. & E. 607.; not reported at the time of this argument.

(c) 8 B. & C. 772.

officers belonged to *Witney*, and the service were to be in the city of *Oxford*. There is a good reason for the distinction; for the justices of a district may be supposed to be more immediately cognisant of the officers of places within their jurisdiction. As to the notice, it is probable that the point in *Rex v. Threlkeld* (a) arose at sessions merely from want of proof of notice, not from actual disproof; and the same may be said of *Rex v. Newark-upon-Trent* (b). It is not necessary to determine at what distance of time the sessions might, if they thought fit, presume the fact of notice in the absence of proof either way. Here the attesting witness was actually called at the appeal, and might have proved the fact, if true. Further, it does not appear but that *St. Clement's* is in that part of the city of *Oxford* which is in *Berkshire*. [Littledale J. You cannot raise that point now.]

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LITTLEDALE J. (c). As to the notice, it was decided in *Rex v. Whiston* (d), and I think properly, that, inasmuch as the justices ought not to allow the indenture unless notice was proved or admitted, the presumption therefore was that, where they had allowed, there had been such proof or admission. That is much the more convenient rule. I do not say that negative proof is inadmissible; but only that the *prima facie* presumption, if not met, is enough. At chambers, when a question arises whether proper notice has been given under the Insolvent Debtors' Act, it is always presumed that, if the Court for the relief of insolvent debtors has been

(a) 4 B. & Ad. 229.

(b) 3 B. & C. 59.

(c) Lord Denman C. J. had left the Court during the argument.

(d) 4 A. & E. 607.

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satisfied, due notice has been given (a). Then as to the allowance of the indenture. There is clearly no pretence of there being two jurisdictions at *Witney*; and, if there were, the case would be provided for by stat. 56 G. 3. c. 139. s. 3. As to the city of *Oxford*, I admit that, in one sense, there may be said to be two jurisdictions; but, so far as the justices of the county are concerned, the city is under the same jurisdiction as the county.

PATTESON J. I have not the least doubt on either point. The jurisdiction is different, in the sense used in the act, only where justices acting in one district cannot act in the other. Sect. 3. makes against Mr. *Chilton's* argument: for, where the place in which the child is to serve has an exclusive jurisdiction, it is expressly provided that the justices of the county may make the allowance; but nothing is said as to the case where the jurisdictions are concurrent, because that was understood to be provided for already. As to the suggestion, that *St. Clement's* may be in that part of the city of *Oxford* which is in *Berkshire*, the order of removal is from the parish of *St. Clement* in the county of *Oxford*. With respect to the notice, I was not present when *Rex v. Whiston* (b) was decided: but I quite concur in the decision. The stat. 56 G. 3. c. 139. s. 2. says that notice must be proved or admitted before the justice shall sign the indenture: we must, then, take it that no justice would put his hand to the indenture before the notice was proved or admitted. The hand

(a) See stat. 7 G. 4. c. 57. s. 60.

(b) 4 A. & E. 607.

and

and seal of the justice is therefore a quasi proof of the notice.

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WILLIAMS J. As to the notice, this is not like the case of an allegation which it is necessary to make in order to show jurisdiction; but the doctrine of presumption applies, because the allowance could be properly made only if notice were proved or admitted. As to the jurisdiction, the binding is good, with or without calling the later act in aid. Certainly there are two sorts of persons who are justices in the city of *Oxford*; namely, the county justices who have jurisdiction in the city, and the city justices who have jurisdiction in the city only. It does not follow that, because the city justices have no jurisdiction without the city, the county justices have no jurisdiction within it.

Order of sessions affirmed (a).

(a) Stat. 3 & 4 W. 4. c. 68. s. 3. enacts that, from and after the passing of that act (28th August 1833), "every indenture for the binding of parish apprentices within any city, borough, or town corporate, shall be allowed by two justices of the peace, one of such justices acting for and on behalf of the county, and the other of such justices acting for and on behalf of the city, borough, or town corporate within the limits of which such child shall be bound."

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Saturday,
May 28th.

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A mortgagor in possession gave by will all his real and personal property to trustees, in trust to sell and apply the proceeds to pay his mortgage and other debts, and funeral expenses, and the residue to his wife for her own use. He also made the trustees his executors, and left some personal property. After his death, the wife resided in the parish where the land was situated, but not on the land; and the trustees resided on the land, and did not sell or render an account:

Held, that the wife gained a settlement by such residence; although it appeared that the trustees would have been glad to sell the land for the principal

and interest due; and although, for the purpose of defeating the settlement, evidence was offered that the real and personal estate was not solvent, which the sessions refused to receive.

ON appeal against an order of two justices removing *Elizabeth Hanson*, widow, from the parish of *Aslackby* to the parish of *Pointon*, both in the county of *Lincoln*, the sessions quashed the order, subject to the opinion of this Court upon the following case.

William Hanson, the late husband of the pauper, being settled in *Pointon*, purchased several closes of land in *Aslackby* for 670*l.*, which, by lease and release of 10th and 11th *January* 1828, were duly conveyed to *Hanson's* use for life, with remainder to a trustee during his life to prevent dower, remainder to *Hanson* in fee. Immediately upon the conveyance, *Hanson* granted a mortgage thereof to *Benjamin Smith* for 450*l.* *W. H.* died seized of the said lands, the mortgage debt, with a considerable arrear of interest, being still a charge thereon.

By will, dated 24th of *May* 1830, *W. H.* devised all his real and personal estates to *Thomas Caswell* and *Joseph Wilkinson*, both large charge bearers and residents in *Aslackby*, in trust for sale, and to apply the proceeds therefrom in payment of his debts due on mortgage, or specialty, or simple contract, at the time of his decease, and the interest of such debts as should carry interest, and also his funeral and testamentary

expenses,

expenses, and the residue to his wife (the pauper), to and for her own use and benefit; to which words he added, "and I give and bequeath the same monies and premises accordingly:" and he appointed the said *T. C.* and *J. W.* his executors. The testator died very soon after the date of his will. Since his death, his trustees and executors have possessed themselves of all his personal estate, consisting of his household goods and furniture, cows, horses, waggons, and stock in trade; and have occupied all his real estate: but have rendered no account to his widow, who has been residing for the last three years (and until her removal) with her father in *Aslackby*. Upwards of a year after her husband's death, and whilst she was so resident in *Aslackby*, *Caswell* the trustee, on her application for assistance, paid her 30s. by two payments, on account.

The respondents called the attorney for the trustees, who proved that the estate had been put up for sale, but no offer had been made for it; that a large arrear of interest had accrued due since the testator's decease; and that the trustees would be glad to sell the estate for the amount of principal and interest.

The respondents then called *Caswell* the trustee, who, being sworn, was asked as to the solvency of the testator's real and personal estate; but the appellants objected to the evidence, on the ground that the court of quarter sessions was not the proper tribunal for such an enquiry, and that, as the pauper, who was alone interested in that enquiry, was admitted to have never been apprised of the state of her husband's affairs, or had any particulars or account thereof rendered to her, the Court could not enter upon the subject either of

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accounts or the present value of the estate, which still remained unsold and in the occupation of the trustees, as these were subjects to be adjusted either by the parties themselves or by the Court of Chancery. The court of quarter sessions concurred in this objection, and quashed the order, subject to the opinion of this Court, whether, under the foregoing circumstances, the evidence was admissible, and whether the pauper took under the will a sufficient estate to confer a settlement, no adjustment of the pauper's affairs having, in the course of four years, been brought to any conclusion.

Amos in support of the order of sessions. First, a devise of the residue of the proceeds to arise out of the sale of lands, after payment of debts, gives an estate in the land. In *Roper v. Radcliffe* (a) land was conveyed by lease and release to trustees in fee, in trust to sell as soon as conveniently might be, and out of the money to be raised by such sale, and out of the rents and profits, until sold, to pay certain debts, and to pay and dispose of the residue to such persons as the releasor should appoint by deed or will. The lands were not sold; and the releasor devised the residue of his real and personal estate to two papists. It was held in the House of Lords that this devise was void, under stat. 11 & 12 W. 3. c. 4. s. 4., as being a purchase of an interest in land; and it was said that, with respect to the heir and residuary legatee, this must be deemed in equity as land, though, in respect of other legatees, and cre-

(a) 9 Mod. 167, 181.

ditors,

ditors, it would be money (a). In *Rex v. Wivelingham* (b) copyhold lands were devised to trustees in fee, in trust to sell, and divide the proceeds equally among four persons. On the death of the deviser, one of the four took possession of part, and resided upon it; and it was held that he gained a settlement by such residence. Secondly, as to the effect of the trust to pay off the mortgage and other debts. The possibility that this may exhaust the proceeds will not frustrate the settlement; *Rex v. Edington* (c). The reason is, that the party residing, up to the time of the sale, is not considered to be in a vagrant and unsettled condition, within the principle of the poor laws, and is interested in seeing that the property be rightly managed, and sold on the best terms. It would produce great inconvenience if it were held necessary that the accounts between mortgagor and mortgagee should be gone into on a question of settlement.

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N. R. Clarke and Bourne, contra. The rule now is, that an equitable estate, to confer a settlement, must be a clear one, that is, such an one as equity would enforce. In *Rex v. Geddington* (d) a purchaser had paid one instalment of the purchase-money, but failed to pay the rest: there a Court of Equity would have enforced the conveyance to him on his payment of the remainder; but it was held that he had no estate sufficient to give a settlement, since a Court of Equity would not consider

(a) *Patteson J.* mentioned that the cases on this point had been lately discussed before the present Lord Chancellor *Cottenham*; the case referred to was probably *Cogan v. Stephens*, before Sir *C. C. Pepys*, Master of the Rolls, November 1835.

(b) 2 *Doug.* 767.

(c) 1 *East*, 288.

(d) 2 *B. & C.* 129.

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the estate to belong to the vendee as he failed to pay the remainder; per *Holroyd J. (a)*. *Rex v. Woolpit (b)* is to the same effect. Here, if the pauper had satisfied the debts, she might have called for a conveyance; but not before. [*Littledale J.* The case of a purchase is different. In the case of a devise, the trustees have the estate in their hands only nominally, till the sale takes place. Here, for any thing that appears, the personalty might be sufficient to satisfy the debts. A Court of Equity would direct an account and marshal the assets; and, if the personalty were enough, the land would be exonerated.] The heir of a purchaser is as much entitled to claim a conveyance as the devisee of the residue: yet it is held that, where the equitable estate is not so perfected that a Court would enforce a conveyance, the purchaser, or his heir, has no settlement: it must therefore be the same as to a devise. Evidence was offered here to shew that there could be no residue; but refused. In *Rex v. Berkswell (c)* the widow and administratrix of an intestate termor resided on the property with one of three daughters of the termor, but made no distribution; and it was held that neither that daughter, nor the daughter's husband, had an equitable estate which would give a settlement; *Abbott C. J.* saying that the husband clearly "had not any such interest as would have enabled him to say, 'I will come and reside on this property.'" And this principle was admitted in *Rex v. Cregrina (d)*. There must be an equitable estate, not merely an equitable interest. How can it be said here that the pauper resided irremovably in the parish,

(a) 2 B. & C. 131, 132.

(b) 4 D. & R. 456.

(c) 1 B. & C. 542.

(d) 2 A. & E. 536.

when

when she had no right to reside at all upon the property? [*Patteson J.* referred to *Rex v. Darlington (a)*, and *Amos* to *Rex v. Houghton Le Spring (b)*.] In the last case the pauper had a vested legal freehold.

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LITTLEDALE J. (c) I think the pauper had an equitable estate sufficient to give a settlement. It is stated that there is a large arrear of interest, and that the trustees would be glad to sell the estate for the amount of principal and interest. But what is the situation of the parties till they do sell? It does not appear what is the amount of the personal property: there may be enough to pay off the debts; and the widow would be entitled to pay off the mortgage. But then it is said that she does not reside. The trustees, however, do reside; and, as they are trustees for her, and liable to account to her, their residence is not adverse to her. It is the same as if she resided herself. It is said that she cannot compel a conveyance till the debts are paid off. That is true; but, if the trustees do not pay, she may force them to apply the personalty. That would come to the same thing as if she herself paid. The first two cases cited against the settlement were cases of purchase. The only one bearing on the point is *Rex v. Berkswell (d)*. But there the daughter had no equitable interest, and no right to do more than call for an account, as one of the next of kin; and the decision is put on that ground by Lord Tenterden. Here the widow would have a right to proceed in equity, and demand an account of all the debt and all the stock, for the purpose of exonerating the land. I think she had an equitable

(a) 5 M. & S. 493.

(b) 1 East, 247.

(c) Lord Denman C. J. was absent.

(d) 1 B. & C. 542.

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estate in the residue. The trustees had no equitable title to the residue, but were, as to that, trustees for the widow. As to the refusal by the sessions to go into the account, it might seem, from *Rex v. Darlington* (a), that the sessions are competent to say whether an estate be solvent or not solvent: but I think, if a witness come in and state that there is such an amount of debt, and such an amount of property, the sessions are clearly not a proper court to go into such an enquiry.

PATTESON J. This is in truth a devise, by a mortgagor in possession, of the equity of redemption. The trustees are to pay the debts: the residue is for the sole benefit of the wife. Then the question is, whether she took any equitable estate; for, if she had any at all, it does not signify what it was. It is not a purchase, so as to come within stat. 9 G. 1. c. 7. s. 5.; but it is an estate devolving by law. *Roper v. Radcliffe* (b) and *Rex v. Natland* (c) are in point. Perhaps *Rex v. Wivelingham* (d) is not quite in point: but there Lord Mansfield referred to *Roper v. Radcliffe* (b), as shewing "that a devisee of the surplus arising from the sale of lands after payment of debts and legacies, has an equitable interest in the lands themselves, it being in his option to pay the debts and legacies, and keep the land." That is the precise situation of things here, supposing the widow had the means of making such payment. It is then said that she had not such means: but that is not the question, but whether she had any estate, profitable or not. Then there is the fact of the pauper not residing on the estate. It is argued that she had

(a) 5 M. & S. 493.

(b) 9 Mod. 167, 181.

(c) Bur. S. C. 793.

(d) 2 Doug. 767.

no right to reside there. Whether she had or not under these trusts might be a question. But the trustees resided; and the only relation between them and her is that of trustees and cestui que trust. That is material, with a view to the explanation of *Rex v. Geddington* (a), where *Holroyd J.* said (b), "If you shew that the vendor and vendee stood merely in the relation of trustee and cestui que trust, then the latter would have an equitable estate, and would gain a settlement." Now, beyond doubt, the parties here did stand in that relation, though they did not there, it being a case of purchase where all the money was not paid. Then comes the question, whether this result is altered by the supposition that the sessions could have gone into the question of assets, in order to ascertain whether any beneficial interest remained. But it is immaterial whether any remained or not: for, if the pauper had any estate, and was resident, the settlement was gained. It may be mentioned that in *Rex v. Darlington* (c), which differed from this case in many respects, the facts as to the residence, or existence of a surplus, were not relied on: the ground of the decision was, that there was no intention on the part of the devisor to give an equitable interest to her brother.

WILLIAMS J. It is now too late to enquire whether a party entitled to an equitable estate can gain a settlement. The cases cited by Mr. *Amos* clearly shew the affirmative; and we cannot now abolish that doctrine. The question then is, whether the pauper here

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(a) 2 B. & C. 129.

(b) Page 131.

(c) 5 M. & S. 493.

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had an equitable estate. The argument that she could get nothing out of the land is not to the point; the only question is, what estate she had. That disposes of the question, whether the sessions were justified in refusing the evidence: her interest would be the same in any case. It is, therefore, quite clear that she was entitled to an equitable estate: and she resided; for the trustees resided on the property, not adversely, but as trustees for their cestui que trust.

Order of sessions confirmed.

Monday,
May 30th.

WILLIAMS *against* GIBBS.

In an action brought in an inferior court, in *Wales*, upon a concessit solvere, though the declaration (according to the usage of such court) state merely a promise and not a consideration, the plaintiff must prove a consideration arising within the jurisdiction.

It is not sufficient to prove that the defendant promised to pay within the jurisdiction, unless it appear that the promise was made upon an account stated, or other consideration arising, there.

CASE against an attorney for negligence. The declaration stated that plaintiff retained defendant to recover from one *David Edward* a debt of 39*l.*, owing from him to plaintiff for goods sold and delivered; and that defendant did not prosecute the business with proper care and skill, but wrongfully and knowingly commenced an action for the recovery of the said sum in plaintiff's name against *D. E.*, in a certain court which had no jurisdiction over the said debt or cause of action, viz. the court of the manor of *Gower*, the said debt having arisen out of the jurisdiction of the said court, as defendant well knew; and that such proceedings were thereupon had, that afterwards, to wit &c., in consequence of defendant's negligence, plaintiff was obliged to have, and had, judgment of nonsuit signed against him, and was nonsuited in the said court, &c. Plea, Not Guilty (*a*). On the trial before *Williams J.*,

(a) There was another plea, denying that plaintiff was nonsuited.

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at the *Glamorganshire* Spring assizes, 1835, it appeared that the former action was upon a *concessit solvere* (a), and was commenced in the manor court of *Gower*; that the general issue was pleaded; that the cause came on for trial in that court; that the debt, which the plaintiff came prepared to prove, was upon a score run up for beer at *Swansea*, out of the jurisdiction of the manor court; and that, on the objection being taken that no cause of action could be proved within the jurisdiction, the plaintiff submitted to a nonsuit (b). On the trial of the present cause, a witness was called to shew that the debtor had, within the jurisdiction of the manor court, made a promise to pay, of which the plaintiff could have given evidence; and this was admitted on behalf of the plaintiff. The learned Judge, in summing up, stated to the jury (among other observations) that it was clear that the goods on which the debt arose had been furnished out of the jurisdiction, and that the defendant knew it; and he directed them to find for the plaintiff, if they thought that the defendant had been guilty of gross negligence in bringing the action in the manor court of *Gower* under those circumstances, and in not warning the plaintiff of his danger, if the action was brought there by his desire. The jury returned a verdict for the plaintiff, damages 5*l.*; but leave was given to move to enter a nonsuit, upon points taken

(a) As to which see 1 *Wms. Saund.* 68. note (2), to *Turbill's Case*.

(b) It was a matter of dispute, on the argument of this case, whether or not there was any plea at the time of the trial in the manor court; and whether the termination of the cause there was equivalent to a nonsuit. It is unnecessary to state the discussion on these points: the view ultimately taken of them by this Court was, that a plea had been put in, and that the plaintiff had, in effect, been nonsuited in the manor court.

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during the trial. *Evans*, in the ensuing term, obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had, on the ground, among others, that no negligence was proved, and that, the promise to pay being laid in the declaration to have been made within the jurisdiction, it was immaterial where the facts took place upon which the promise was founded.

E. V. Williams and *C. Powell* now shewed cause, and contended that the defendant in this cause was guilty of gross negligence, having commenced the action in a court where the plaintiff could have no chance of success, inasmuch as, where a suit is commenced in an inferior court, not only the promise must have been made, but the cause of action must have arisen, within the jurisdiction; *Peacock v. Bell* (a).

John Evans and *Nicholl*, contra. It does not appear that there was any negligence. The action was on a concessit solvere, in which it is sufficient to allege that the defendant promised to pay. This action, therefore, was well supported by proof of such a promise made within the jurisdiction. In *Emery v. Bartlett* (b) the action was brought upon an insimul computasset; and the declaration alleged an accounting within the jurisdiction, but not that the sums of money were due there; on which ground error was brought. The Court, however, over-ruled the objection, "because the action was grounded upon the stated account, which was laid to be

(a) 1 *Wms. Saund.* 79. (b) 2 *Ld. Raymd.* 1555. S. C. 2 *Stra.* 827.

stated

stated within the jurisdiction." The promises admitted in the present case were equivalent to an account stated. And the plea of the general issue traverses the fact of the debt arising out of the jurisdiction within the defendant's knowledge; *Thomas v. Morgan (a)*.

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LORD DENMAN C. J. It appears to me that there was clearly a case of negligence. *Emery v. Bartlett (b)* is inapplicable. The debt, here, is the consideration for the promise. If, indeed, any thing like an agreement to pay the debt, made upon an inspection and settling of the accounts between the parties, had been proved to have taken place, the case would have fallen within the principle of *Emery v. Bartlett (b)*; for then the consideration for the promise would have been within the jurisdiction. But on *concessit solvere* we cannot infer, from a mere promise, a consideration for that promise within the jurisdiction.

LITLEDAL J. If two parties meet and settle accounts within a jurisdiction, it is not necessary to show that any item arose within the jurisdiction: the action being on an account stated, it is enough if it be stated, and the consequent promise to pay be made, within the jurisdiction. My only doubt has been, whether evidence of a promise to pay was evidence of an account then stated. But a mere promise to pay, such as one man might make to another whom he met in the street, would not be such evidence; though, if two parties were heard talking over the debt, and one of them promising to pay the

(a) 4 Dowl. P. C. 223. (b) 2 Ld. Raymd. 1555. S. C. 2 Stra. 827.

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other, that might be sufficient evidence for the purpose. If the defendant did not carry his client's case as far as this, he did not bring it within the jurisdiction of the inferior court.

PATTESON J. The declaration in *concessit solvere*, in *Wales* (though I believe it is otherwise in *London (a)*), is so general that it does not state the consideration: of course, therefore, it will not appear that the consideration arose within the jurisdiction. But there, as elsewhere, there must be some consideration in fact; a promise without consideration would not support the action. The consideration, therefore, must be within the jurisdiction. *Emery v. Bartlett (b)* shews no more: there the statement of account was the consideration. To shew, therefore, that the action is maintainable, it must be shewn that the consideration arose within the jurisdiction. That was not proved here; but only a promise. Suppose a man were heard to say "I promise to pay," is that enough? Certainly not: it is a *nudum pactum*, unless he was also heard to say "I owe." The action was therefore not maintainable in the manor court of *Gower*.

WILLIAMS J. If the party, at the time of the promise, had had documents before him shewing the debt, that would have been evidence of an account then stated: but the only evidence of the consideration was, that a debt had accrued in *Swansea*.

Rule discharged.

(a) See note (2) to *Turbill's Case*, 1 *Wms. Saund.* 68.

(b) 2 *Id.* *Raymd.* 1555. *S. C.* 2 *Stra.* 827.

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FAULKNER *against* CHEVELL.Tuesday,
May 31st.

DEBT, on stat. 22 G. 2. c. 46. s. 14. The first count of the declaration stated that *Charles Pestell Harris*, before and at the times &c., was the clerk of the peace for the town of *Cambridge*, in the county &c.; and defendant then was the deputy of the said *C. P. H.*, so being and as such clerk of the peace. And that defendant, so being such deputy, after *September 29th*, 1749, and within twelve months next before the commencement of this suit, to wit on &c., at the general quarter sessions of the peace of our Lord the now King, then holden at the *Guildhall* of the said town, in and for the said town, being the town where defendant executed his office of such deputy as aforesaid, before *T. C.* and *A. S. A.* Esquires, and others their companions, justices, &c., assigned &c., did act and presume to act as an attorney for one *J. D.*, by then, at the said sessions, as the attorney in that behalf of and for the said *J. D.*, managing and conducting the prosecution of a certain indictment against one *F. H.*, and upon the trial at that sessions of a certain issue joined upon the said indictment, and which said issue was then tried at the said sessions, contrary to the form of the statute &c.; whereby, and by force of the same statute, defendant forfeited for his said offence 50*l.*, and thereby and by force of the statute &c. an action hath accrued &c. There were several other counts similarly framed, charging other offences by practising contrary to the statute.

To a declaration in debt on stat. 22 G. 2. c. 46. s. 14., charging the defendant that he, being deputy clerk of the peace, practised at the sessions as an attorney, a plea (since the new rules) that defendant was not at any of the times &c. deputy clerk of the peace, nor did he commit any of the supposed offences in manner and form &c., is bad for duplicity.

Seemle, that a plea of Not Guilty would be good.

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Plea, that defendant was not at any of the said times in the declaration mentioned the deputy of the said *C. P. Harris* as such clerk of the peace as in the said declaration alleged, nor did he the said defendant commit any of the said supposed offences contrary to the form of the statute in the said declaration mentioned, in manner and form &c. Conclusion to the country.

Demurrer, assigning for causes, that defendant hath not, according to the rules lately made relative to pleadings in actions of covenant and debt, denied specifically only some one particular matter of fact alleged in the declaration, or pleaded specially in confession and avoidance, but hath denied and put in issue, not only the fact of defendant's being at the times &c., the deputy &c., but also his having committed any of the offences contrary to the form &c., and hath thereby put in issue several distinct matters of fact, &c. And also that defendant, contrary to the said rules, &c., hath by his plea denied and put in issue the fact of his being such deputy &c., the existence of such quarter sessions, prosecutions, indictments and proceedings as in the declaration mentioned, and also his having acted as therein mentioned, and having committed the several offences &c., whereas he ought to have specifically denied and put in issue only some one of these matters. The demurrer went on to present the objection of duplicity in other ways; and it stated that the defendant, having denied committing the offences, ought not to have also traversed his being deputy, but should have relied on that traverse being included in the former. And that the plea amounted to nil debet, which is not allowed by the said rules. Joinder in demurrer.

Kelly

Kelly (with whom was *Gunning*), in support of the demurrer (a). The plea is double, inasmuch as it tenders two issues, either of which would determine the whole action. The plaintiff could not answer it without duplicity in his replication. Nor is it made good by stat. 21 *Ja.* 1. c. 4. s. 4., which enables defendants, in penal actions, "to plead the general issue, that they are not guilty, or that they owe nothing;" for this plea does not follow either of those forms. Besides, that enactment does not apply to actions given by statutes subsequently passed; this was held in *Rex v. Gaul* (b), and *Hick's Case* (c), and seems admitted in *Shipman v. Henbest* (d). In the rules, *Hil.* 4 *W.* 4., *Pleadings in particular actions*, II., 2, 3, 4 (e), it is laid down that the plea of nil debet shall not be allowed in any action; that in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead as is there pointed out; and that "in other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." Here the defendant has traversed two specific matters of fact, either traverse, if supported, being a sufficient answer to the action. [*Littledale J.* The rules were never meant to apply to these cases; if they do, it was an oversight in drawing them up.]

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(a) Before Lord Denman C. J., *Littledale, Patteson, and Williams J.*s.

(b) 1 *Salk.* 372.

(c) 1 *Salk.* 373.

(d) 4 *T. R.* 109. See the judgment of Lord Kenyon, p. 114.

(e) 5 *B. & Ad.* viii.

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W. H. Watson, contrà. The rules just cited apply only to cases in which the statute 4 *Ann. c. 16. s. 4.* gave the privilege of pleading several matters; and that statute (*s. 7.*) withholds the privilege in actions upon penal statutes. It was held in *Miller v. Miller (a)* that stat. 3 & 4 *W. 4. c. 42.* must be read in conjunction with stat. 11 *G. 4 & 1 W. 4. c. 70.*, both being in *pari materiâ*; and that the clause of 3 & 4 *W. 4. c. 42. s. 1.*, enabling the Judges of the superior Courts of common law at *Westminster* to make rules for pleading in those Courts, though generally expressed, must be taken as qualified by sect. 11. of the earlier statute, which gives the limited power of making rules "in matters over which the said Courts have a common jurisdiction." Upon the same principle of construction, stat. 3 & 4 *W. 4. c. 42.*, being in *pari materiâ* with the statute of *Anne*, and corresponding with it in title, the power of making rules under the recent statute must be considered as limited by the provision of the older one, *s. 7.*, "that nothing in this act before contained, shall extend to any" "action or information upon any penal statute." The new rules of pleading, *Hil. 4 W. 4.*, evidently contemplate cases in which several pleas may be pleaded; and they make no provision for actions on penal statutes.

It is not necessary to rest any argument on the statute 21 *Ja. 1. c. 4. s. 4.* Before that statute, *Not Guilty*, as well as *nil debet*, was a good plea in a penal action; *Langley v. Haynes (b)*, *Johns v. Carne (c)*,

(a) 3 *Dowl. P. C.* 408. As to sect. 8. of 11 *G. 4.* and 1 *W. 4. c. 70.*, see *Rex v. Wright*, 1 *A. & E.* 434.

(b) *Moore*, 302.

(c) *Cro. Eliz.* 621.

Wortley v. Herpingham (a). In *Bull. N. P.* 197. it is laid down that "wherever the action is founded on a penal statute, not guilty or *nil debet* are good pleas;" and *Bantrey v. Isted* (b), which however does not bear out the whole proposition, is cited. It is sufficient, therefore, if the plea be, in substance, a plea of Not Guilty, notwithstanding any words used in the statute of *James*.

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It is contended that the plea is double, as tendering several distinct issues; but the plea of Not Guilty would have tendered as many. When it is said that duplicity in pleading shall not be allowed, it is meant that a party shall not set up two distinct answers, but not that he shall be precluded from traversing all the facts alleged on the other side. [Lord *Denman* C. J. Your plea first traverses a particular fact, and then concludes with Not Guilty]. The plea is, in effect, the same as if the general issue were pleaded to the whole. The general issue is only a short way of traversing all the facts. It has been much discussed, in *Crisp v. Griffiths* (c) and some other late cases in the Court of Exchequer, whether a plaintiff in an action upon contract might by his replication put in issue several facts pleaded by way of excuse; and the opinion of that Court appears to be that he may. [Patteson J. In *Griffin v. Yates* (d), where the replication offered distinct traverses upon several of the matters pleaded, the Court of Common Pleas gave leave to the plaintiff to amend by replying

(a) *Cro. Eliz.* 766.(b) *Hob.* 218. (ed. 5.).

(c) 2 *Cro. M. & R.* 159.; *S. C.* 5 *Tyrrwh.* 619. See *Isaac v. Farrar*, 1 *Maz. & W.* 65.; *S. C.* *Tyrrwh. & Gr.* 281.; and the cases there cited. Also *Watson v. Wilks*, post, p. 237.

(d) 2 *New Ca.* 579.

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de injuriâ.] The rule as to duplicity, with the old authorities on the subject, will be found fully stated in *Archbold's Digest of Pleading and Evidence*, pp. 174-6. (a). In the present case, the particular fact, that the defendant was deputy clerk of the peace, was traversed, because it was matter of inducement in the declaration, and it might have been said that, under the new rules, that fact was not denied by a mere plea of Not Guilty (b). [*Patteson J.* The declaration first alleges that the defendant was deputy clerk of the peace, and it then goes on to state that he "being such deputy" (though it would have been better to say "while he was such deputy (c),") acted as an attorney at the sessions]. If the plea of Not Guilty involves a denial of the fact that the defendant was deputy, the previous denial of it is surplusage.

But, further, the declaration is bad, as it merely charges the defendant, in each count, with acting as an attorney by managing a prosecution, &c., at the sessions, whereas the penalty of stat. 22 G. 2. c. 46. s. 14. is imposed only upon any deputy clerk of the peace who shall "act as a solicitor, attorney, or agent, to sue out any process, at any general or quarter sessions," &c., which the defendant is nowhere charged with having done. [*Patteson J.* The word is "to" sue out any process, in some printed copies of the statutes, but not in others ;

(a) 2d ed. 1837.

(b) *Watson* here referred to a ruling at *Nisi Prius* in *Berkley v. Watling*, tried before *Tindal C. J.* at the Summer assizes for *Newcastle-on-Tyne*, 1835, as shewing that the rule on this subject was not confined to actions of case and trespass.

(c) See *Eaton v. Southby*, *Willes*, 131, and 134 note (a); *Rex v. So-merton*, 7 B. & C. 463.

and

and on the parliament roll the word is "or." I referred to it in a case in which I was counsel.] Then the objection fails. [Lord Denman C. J. mentioned *Coppin v. Carter (a)*, in which it was held, on general grounds, that, in debt on a penal statute, the plea of Not Guilty was at least not a nullity.]

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Gunning, in reply. Supposing Not Guilty to be a good plea at common law, there is no authority for a plea in the present form. The defendant might have pleaded that he did not, while deputy, or being deputy, act as an attorney. No inference can be drawn as to the present case from *Miller v. Miller (b)*, where the application was to set aside the plea in a writ of right, a proceeding exclusively within the jurisdiction of the Court of Common Pleas. By the express words of stat. 11 G. 4. & 1 W. 4. c. 70. s. 11., which has been referred to as governing the construction of stat. 3 & 4 W. 4. c. 42. s. 1., the Courts of King's Bench, Common Pleas, and Exchequer are to make rules of practice in matters over which the said Courts have a common jurisdiction: and penal actions are such matters. The object of stat. 3 & 4 W. 4. c. 42., in giving the power to make rules, is stated in the preamble to be that, in suits in the superior courts of common law at *Westminster*, the questions to be tried by the jury should be left less at large. The design, therefore, seems to have been to include every form of action over which those courts had jurisdiction. Then, by the rules, *Hil. 2 W. 4. II. tit. In Covenant and Debt, s. 2. (c)*, it is directed that the

(a) 1 T. R. 462.

(b) 3 Dowl. P. C. 408.

(c) 5 B. & Ad. viii.

plea

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plea of nil debet shall not be allowed in any action. [*Littledale J.* The joining of covenant and debt under one head may perhaps shew that those actions of debt were contemplated which have some kind of contract for their foundation.] Sect. 3., which enables the defendant "in actions of debt on simple contract, other than on bills of exchange and promissory notes," to plead that he never was indebted in manner and form &c., evidently does not apply to actions like the present. But then sect. 4. directs that, in other actions of debt in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny some particular matter of fact stated in the declaration, or plead specially in confession and avoidance. Now it does not appear what "other actions of debt" (except those on bills and notes) can be meant by this rule, unless it contemplates actions on penal statutes. [*Watson* mentioned as instances, debt on by-laws, and debt for various rents.]

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of this term (*June 10th*) delivered judgment as follows:—We think that this plea is bad on the face of it, as containing two independent defences. But, if the defendant thinks proper, within a reasonable time, to plead Not Guilty, he may do so. As at present advised, we think that such a plea would be good; but that is merely our impression.

Defendant to amend (*a*).

(a) See note to *Henslow v. Fawcett*, 3 A. & E. 60, 61.

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FLEMING *against* COOPER.Tuesday,
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TRESPASS. The declaration charged the defendant with breaking and entering two closes *of and belonging to the plaintiff*, to wit, a certain close of the said plaintiff (describing it), and a certain other close of the said plaintiff (describing it), and placing timber and stones, and building a wall thereon, and thereby encroaching upon and incumbering the said closes, and hindering plaintiff from having the free use, benefit, and enjoyment of the same, in so large, ample, and beneficial a manner, &c. There was a second count, for breaking and entering a close of the plaintiff, and pulling down and carrying away rails, posts, &c.

Pleas. 1. Not Guilty. 2. Justification; alleging that the said closes in which &c. were the closes, *soil and freehold*, of the defendant. Verification. 3. That the plaintiff was not, at the said times when &c., or either of them, or any part thereof, *possessed* of the said closes, posts, rails, &c., in the declaration mentioned, or any or either of them, or any part thereof, in manner and form, &c. Conclusion to the country. 4. Justification; alleging that defendant, at the said times when &c., was lawfully *possessed* of the said closes in which &c., and ending with a traverse of the said closes, or any or either of them, or any part thereof, having been, at the said times when &c., the *closes or close of the plaintiff* in manner and form &c. Conclusion to the country.

Trespass for breaking closes *of and belonging to plaintiff*, encumbering them with stones, &c., and thereby depriving plaintiff of the full use and enjoyment of the closes; also for pulling down rails, &c., thereon.

Pleas, 1. Not Guilty. 2. Justification, alleging freehold in defendant: verification.

3. Denying that plaintiff, at the times when &c., was *possessed* of the said closes, rails, &c., in manner and form &c.: concluding to the country.

4. Justification, alleging that defendant, at the times when &c., was lawfully *possessed* of the closes, and traversing that the closes were, at the times when &c., the closes of plaintiff in manner and form &c.: conclusion to the country:

Held, on

special demurrer, that the third plea was properly concluded to the country.

Demurrer

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Demurrer to the third plea, assigning for causes that the said plea concluded to the country, although it introduced new matter; and that it contained a justification, and therefore ought to have concluded with a verification.

Bingham, in support of the plea, mentioned *Heath v. Milward (a)* as a case in point. [*Patteson J.* It is].

No one appearing in support of the demurrer,

Per Curiam (b),

Judgment for the defendant.

(a) 2 *New Ca.* 98.

(b) Lord *Denman C. J.*, *Patteson* and *Williams Js.*

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JONES against OWEN.

To indebitatus
assumpsit for
20*l.* defendant
pleaded,

1. Non as-
sumpsit, except
as to the sums
of 3*l.* and 1*l.*

2. As to the
said 3*l.*, parcel
of the sum
mentioned in
the declaration,
that, after the
promise therein
mentioned as
to the 3*l.*, and
before action

ASSUMPSIT. The declaration stated that defend-
ant was indebted to plaintiff in the sum of 20*l.*, for
goods sold and delivered, and 20*l.* found due on an ac-
count stated, and in consideration thereof "promised to
pay" the said monies respectively to plaintiff on request.

Pleas. 1. As to the said several sums of money in
the declaration mentioned, except as to the several sums
of 3*l.* 9*s.* 5½*d.* and 1*l.*, making together 4*l.* 9*s.* 5½*d.*,
parcel of the said several sums &c., non assumpsit.

brought, viz. on &c., defendant tendered the 3*l.*, parcel &c., to plaintiff, &c. (in the usual form). 3. As to the 1*l.*, other parcel &c., that, heretofore and after the said promise as to the 1*l.*, and before action brought, viz. on &c., defendant paid plaintiff the 1*l.*, parcel &c. On demurrer to the second plea, assigning for cause that the tender appeared to be only of part of the admitted debt, and that the residue was not shewn to have been previously paid: Held, that the tender was well pleaded.

Per Lord *Denman C. J.*, a declaration stating that defendant was indebted to plaintiff in 20*l.* for goods sold, and in consideration thereof *promised* (not adding "*the said plaintiff*") to pay plaintiff the said 20*l.* on request, is good, independently of the rule, *Trin.* 1 *W.* 4. Schedule, tit. *Common Counts*.

2. As

2. As to the said sum of 3*l.* 9*s.* 5½*d.*, parcel of the said several &c., that plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any greater damages than the said 3*l.* 9*s.* 5½*d.*, parcel &c.; because he says that, after the making of the said promise in the said declaration mentioned, as to the said 3*l.* 9*s.* 5½*d.*, parcel &c., and before the commencement of this suit, to wit *December* 3*d.*, 1834, he, defendant, was ready and willing, and then tendered and offered to plaintiff, to pay him the said 3*l.* 9*s.* 5½*d.*, parcel &c., to receive which of the defendant the plaintiff then wholly refused; and defendant saith that he hath always, from the time of the making of the said promise as to the said 3*l.* 9*s.* 5½*d.*, parcel &c., hitherto, been ready to pay, and still is ready to pay, plaintiff the said 3*l.* 9*s.* 5½*d.*, parcel &c.; and he now brings the same into court here, &c. And this (Verification): wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him, to recover any more or greater damages &c. 3. As to the said sum of 1*l.*, other parcel &c., that, heretofore and after the making of the said promise &c., as to the said 1*l.*, parcel &c., and before the commencement of this suit, and (a) before plaintiff had sustained any damage by reason of the nonpayment of the same, to wit *December* 1*st.*, 1834, defendant paid plaintiff 1*l.* in discharge of his said promise as to the sum of 1*l.*, parcel &c. Verification.

Demurrer to the second plea, assigning for cause, that the said plea is pleaded only as to part of the amount admitted to have been owing by defendant to plaintiff;

(a) *Littledale J.* observed, in the course of the argument, that this was an unusual averment.

but

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but it does not appear that, at the time of the tender therein pleaded, the residue of the said debt had been discharged; but, for any thing that appears by the plea, the whole amount admitted by defendant to have been due from him to plaintiff, in respect of the causes of action in the declaration mentioned, still continued owing and unpaid at the time of the said tender: and there is no cause assigned or shewn to make the tender of the smaller amount a good tender where more was at the time due. Joinder in demurrer. Issues in fact were joined on the other pleas.

R. V. Richards, for the plaintiff. There cannot be a legal tender in part of a debt; and here it may be taken as admitted by the pleadings that, when the 3*l.* 9*s.* 5½*d.* was tendered, 1*l.* more of the same debt was due. The party pleading a tender must set forth all the facts requisite to make it valid, *Lancashire v. Killingworth* (a); nothing will be presumed in his favour. If the defendant here meant to allege that the 1*l.* and the 3*l.* 9*s.* 5½*d.* were distinct debts, he should have shewn that by his pleading. It is true that a difficulty was thrown on the defendant by the new rules of pleading, as he might formerly have pleaded non assumpsit as to all but the sum tendered, and availed himself of the part payment under the plea of non assumpsit, whereas now the payment must be pleaded. The defendant should have engrafted upon his plea of tender an averment that the 1*l.* had been previously paid. [Lord Denman C. J. Is there any authority for the pro-

(a) 2 Salk. 623.

position,

position, that tender of part of a debt is bad?] It is so stated in *Chitty Jun. on Contracts*, p. 619 (a); and, if this were not so, it would be in the debtor's power, at his pleasure, to alter the creditor's remedy by splitting the debt.

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John Jervis, contra. It is true that, since the new rules, a defendant cannot avail himself of a plea of non assumpsit as to part, joined with a plea of tender, because payment cannot be given in evidence under non assumpsit. The plea of tender, therefore, is here pleaded by itself: and, if it be taken separately from the rest, the present objection will not arise; for it does not appear to be admitted that any thing more was due. The second and third pleas together furnish a sufficient answer as to all the money admitted by the pleadings to have been due; for the third plea alleges payment of the 1*l.* before the plaintiff had sustained damage by the non-payment, that is, in effect, immediately the debt was due. It would be difficult, otherwise, for a party to shape his defence, if he had paid part of a debt and tendered what he understood to be the residue. There is a plea sufficiently alleging a tender of 3*l.* 9*s.* 5½*d.*; and a further plea, not demurred to, stating payment of 1*l.* It is matter of evidence, as to the latter sum, whether it had been paid or not when the tender was made. Besides, it does not appear that these were not separate debts; the declaration may include several, and a separate tender may be pleaded as to one. "It was agreed in avowry, that where the lord

(a) 2d ed. 1834.

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distrains for two rent days arrear, and the tenant offers the one, the lord is bound to receive it, and if he distrains he does a tort;" 20 *Vin. Abr.* p. 182. *Tender* (E), pl. 2., citing *Br. Abr. Tender*, pl. 2., which again cites *Yearb. Mich.* 2 H. 6. f. 1. pl. 1. (a).

The declaration is bad, because it does not allege a promise to the plaintiff; *Price v. Easton* (b). [*Little-dale J.* There no consideration appeared for a promise by the defendant to the plaintiff.] It is true that, here, a privity is established between the parties in respect of the consideration, which distinguishes the two cases.

R. V. Richards, in reply. It is not for a jury to say whether all that is not tendered had been paid. That is to be collected from the record; and, if it appears by the plea that more than the sum tendered was due, the defendant is not entitled to call upon the plaintiff to shew that the sums in question are not separate debts. He ought to have shewn that they were.

LORD DENMAN C. J. The declaration is in the form given by our own rules (c); we cannot call them in question: and independently of them it is good. Then, as to the plea, the demurrer alleges it to be bad, as not shewing a tender of the whole sum due. But the record does state that the whole sum due was tendered and paid. The plea alleging payment of 1*l.* follows the plea of

(a) It it added (pl. 3, citing the same authorities), "but if he distrains for the rent of one day, and tenant offers part of it, the lord is not bound to receive it, but he may distrain. Note the diversity." The passage in the Year-book is in fol. 4*b.*

(b) 4 *B. & Ad.* 433.

(c) *Trin.* 1 *W.* 4. *Schedule*, tit. *Common Counts*, 2 *B. & Ad.* 787.

tender;

tender; but it cannot be inferred from that that there was a subsequent payment of 1*l.* in part of the debt; and, if the defendant tendered all that was due at the time of tender, that is sufficient. It does not appear by the pleadings that the tender of 3*l.* 9*s.* 5½*d.* was not a tender of the whole sum due.

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LITLEDAL J. If it appeared by the plea that 3*l.* 9*s.* 5½*d.* was tendered as the whole amount of the debt, whereas more was claimed by the plaintiff and was unpaid, a different objection would arise from that raised on the present pleadings. If, on the other hand, it appeared that 1*l.* had been paid, and 3*l.* 9*s.* 5d½, the residue of the debt, tendered afterwards, there would be no difficulty. Here we cannot collect from the pleadings when the 1*l.* was paid; and I do not think we can mix up the second plea with the third: each must speak for itself. The plea of tender is perfect, if not coupled with any of the allegations as to the 1*l.*; and, that being so, the two pleas offer a complete bar as to the whole of the sums in question; the one as to the 3*l.* 9*s.* 5½*d.*, and the other as to the 1*l.*

PATTESON J. Before the new rules, the proper plea would have been the general issue as to all but 3*l.* 9*s.* 5½*d.*, and a tender of that. By those rules, the plaintiff was obliged to put the payment of 1*l.* on the record. Then the ground of demurrer is in substance this; that the second plea is bad, because it does not aver that 1*l.* was paid before the remaining sum was tendered, and, therefore, does not shew a legal tender. But the tender should have been traversed, if no valid one was in fact made; that is, if an offer as to part only be an invalid

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tender of that part; on which it is not necessary to say any thing.

WILLIAMS J. Mr. *Richards* himself looks at the whole of the pleas to raise his objection, which is, in substance, that the payment of 1*l.* does not appear to have preceded the tender of 3*l.* 9*s.* 5½*d.* But there is no ground for that assumption, except that the allegation of payment comes after that of tender. And if, by any reasonable construction, the payment can be considered as prior in time, the objection, in the form suggested, does not arise.

Judgment for the defendant.

Tuesday,
May 31st.

MARY LLOYD *against* WILLIAM WOOD, Esquire.

Declaration in case stated that a suit in Chancery, by *J.* against *F.* and the present plaintiff, being pending, it was ordered by the Court of Chancery that *J.* should pay money into Court, to the credit of the

CASE. The declaration stated that, before and at the time of the making the order and the committing the grievance next after mentioned, a suit had been pending in the High Court of Chancery, wherein *Fredericus Tertius Jeyes* was plaintiff, and *Robert Foreman* and the now plaintiff were defendants, and that, to wit, 6th of March 1834, it was ordered by the said Court that *F. T. J.* should, within three days after a writ of

cause, subject to the further order of the Court: that, *J.* having contemptuously neglected so to do, to plaintiff's damage, plaintiff caused a writ of attachment to be sued out of Chancery against *J.*, directed to defendant, being sheriff of *N.*, which writ was delivered to defendant to be executed; whereupon it became defendant's duty to execute it in a careful and proper manner: yet defendant wrongfully, carelessly, and improperly, and against plaintiff's consent, attached *J.* by his body, *J.* being then privileged from being so attached, and defendant well knowing the premises; that *J.* was discharged by the Court of Chancery from the attachment; and, by means of the premises, plaintiff was deprived of the benefit of the writ, and delayed and hindered in compelling *J.* to pay, and was put to expenses and trouble in causing another writ to be issued, and was also put to costs in opposing *J.*'s discharge, and was otherwise damaged:

Held bad, for not setting out the nature of *J.*'s privilege, and that the objection might be taken on demurrer to the declaration, though not assigned for cause.

Semble, also, that the declaration disclosed no cause of action.

execution

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execution of that order, to be verified by affidavit, pay into the Bank, with the privity of the accountant-general of that Court, to be there placed to the credit of the said cause, subject to the further order of that Court, 872*l.* 13*s.* 6*d.*, which, by an order bearing date 16th of *December* 1833, was directed to be paid in &c.: and whereas, before the committing &c., to wit 22d of *March* 1834, for having execution of the said order, the now plaintiff caused to be sued out of the said Court of Chancery a certain writ, bearing date the day and year last aforesaid, directed to the said *F. T. J.*, and whereby, after reciting that the said order had been lately made, &c., our lord the King enjoined and commanded *F. T. J.* to perform, fulfil, and execute the matters and things contained in the said order, so far as the same did any way relate to or concern him, according to the tenor, &c., of that writ, which said writ of execution was afterwards, to wit 11th of *April* 1834, personally served upon *F. T. J.*, but *F. T. J.* did not, within three days after that service, or at any other time, comply therewith, and broke the same and the said order in this, to wit that he did not nor would pay &c., but wholly and contemptuously neglected and refused so to do, to the plaintiff's damage; and thereupon the plaintiff did afterwards, to wit 26th of *April* 1834, verify the service of the said writ of execution, by affidavit &c.: and the plaintiff did, to wit 26th of *April* 1834, cause to be sued out of the said Court of Chancery a writ of attachment, directed to the sheriff of the county of *Northampton*, whereby our lord the King commanded the said sheriff to attach *F. T. J.* for the said breach of the said writ of execution; and the said writ of attachment was returnable on 21st of *May*

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then next: which writ of attachment was afterwards, to wit 29th of *April* 1834, delivered to the now defendant, who then, and from thence until and at and after the return of the said writ, was sheriff of the said county, in due form of law to be executed: and thereupon it then became and was the duty of the defendant, as such sheriff, to execute the said writ in a careful and proper manner: yet the defendant, not regarding &c., afterwards and before the return &c., to wit 9th of *May* 1834, as such sheriff, wrongfully, carelessly, and improperly, and against the consent of the plaintiff, attached *F. T. J.* by his body, under colour and in execution of the said writ of attachment, he, *F. T. J.*, being then privileged and protected from being so attached, and the defendant well knowing the premises: and the defendant, as such sheriff, kept and detained *F. T. J.* in his custody, under the said attachment, and under colour and in execution of the said writ of attachment, from thence until and at and after the return thereof, to wit on the 27th of *May* 1834; when *F. T. J.* applied in the said cause to the Court of Chancery for his discharge out of the custody of the defendant, as to the said writ of attachment, by reason of *F. T. J.* having been so attached as aforesaid at a time when he was privileged and protected therefrom; and such proceedings were had on that application, that afterwards, to wit 27th of *May* 1834, by reason of *F. T. J.* having been so attached at a time when &c., it was ordered by the said Court of Chancery that *F. T. J.* should be forthwith discharged &c., and *F. T. J.* was thereupon then discharged &c. accordingly; and, by means of the premises, the plaintiff then lost and was deprived of the benefit of the said writ of attachment, and was delayed and hindered in
the

the enforcing and compelling of *F. T. J.* to pay &c., as by the said order and writ he was commanded; and the plaintiff was also put to great costs, &c., amounting, to wit &c., and to divers journeys, and great trouble, &c., in and about the causing to be issued out of the said Court of Chancery another writ of attachment against *F. T. J.* for the said breach of the said execution; and also, by means of the premises, the plaintiff was put to great costs, &c., amounting, to wit &c., in and about opposing the said application of the said *F. T. J.*, and his obtaining the said order as aforesaid; and hath been and is otherwise injured &c.

Demurrer (a) and joinder.

Peacock, for the defendant. First, it does not appear that the plaintiff has any right of action: at all events, it is a case of the first impression. In *Tarlton v. Fisher* (b) a party privileged from arrest sued a sheriff's officer for arresting him; and it was held that the action did not lie; and the opinion of the judges who decided that it did not (c) clearly was that a sheriff, even if notice of privilege be given to him, is not bound to take upon himself to judge of the privilege, but may still arrest; though, on the other hand, if he do take upon himself to judge of the privilege, and refuse to arrest a party who turns out not to be privileged,

(a) The demurrer assigned for causes that it was not stated in the declaration whether the defendant was directed to attach *F. T. J.* by his body or by his goods, and that the declaration did not fully set out the writ, or shew sufficient for the Court to say whether the sheriff was bound, under the writ, to attach *F. T. J.* by his body, or that the defendant acted maliciously. These grounds of demurrer were not insisted upon in argument.

(b) 2 *Doug.* 671.

(c) *Willis J.* inclined to think that the action lay.

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he is liable to an action. *Cameron v. Lightfoot* (a) is to the same effect. In *Crossley v. Shaw* (b) it was held that the sheriff of *Lancashire* was not liable for arresting and detaining an attorney of the King's Bench, though the attorney sued a writ of privilege out of the King's Bench, directed to the Chancellor of the Duchy, after which a writ, reciting the former, and to the same purport, under the seal of the county Palatine, was delivered to the sheriff, but he continued afterwards to detain the attorney; and the Court there said that the sheriff was not bound to discharge the attorney on being served with the writ; and they pointed out the proper method of proceeding. [Lord Denman C. J. mentioned *Stokes v White* (c).] There case was brought against a party suing out a writ on which the plaintiff was arrested while attending a trial as a witness under a subpoena; and it was held that the action was not maintainable, no proof of the defendant's knowledge having been given. That, as far as it is applicable, is in favour of the defendant here; for the declaration does not substantially aver knowledge. The party arrested might perhaps not claim his privilege, or it might be a privilege resting upon the discretion of the Court: of all this the sheriff could not be bound to take notice. And, further, the nature and existence of the privilege are matters for the Court, not for the jury: the declaration, therefore, ought to have shown how the privilege was constituted; it is not sufficient simply to allege the fact of the privilege; *Lord Lisle's*

(a) 2 W. Bl. 1190.

(b) 2 W. Bl. 1085.

(c) 1 C. M. & R. 223. S. C. 4 Tyrwh. 786.

Case (a). Suppose issue had been taken on the fact of privilege, how could a jury judge of the existence of the sort of privilege which might be set up, as, for instance, a privilege by the allowance of the commissioners of bankrupts, under stat. 6 G. 4. c. 16. s. 117.? Here, too, the attachment was not for non-payment of money to the party, but for non-payment into Court, which is a contempt, in the strict sense, of the Court of Chancery. It may be doubted how far the particular privilege protects a party from such an attachment. This omission in the declaration is a substantial defect, and makes it bad, though not shewn for cause of demurrer, although, perhaps, it might be cured by verdict: there is not sufficient matter on the pleadings for the Court to "give judgment according to the very right of the cause" (stat. 4 Ann. c. 16. s. 1.). Thus, replying de injuriâ improperly was held bad on general demurrer, in *Hooker v. Nye* (b). Further, the damage is wrongly assigned. It is alleged that the plaintiff lost the benefit of the writ of attachment: but it does not appear that she was interested in the payment of the money. And, as to the issuing of the new writ, the declaration does not shew that, if the sheriff had not taken the party, as charged in the declaration, the first writ would have been available. Neither was the plaintiff forced to oppose the discharge: the arrest was, according to the declaration, made without the plaintiff's consent: by opposing the discharge, she ratifies the sheriff's act.

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(a) *Yearb. Hil. 22 Ed. 4. 40 b. pl. 2. Br. Abr. Condiciones, pl. 183.* Cited in *The Case of The Abbot of Strata Mercella*, 9 Rep. 25 a.; and in *Reniger v. Fogossa*, Plowd. 7.

(b) 1 C. M. & R. 258. S. C. 4 Tyrwh. 777

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Kelly, contra. This is not an action of trespass by a party privileged, but an action on the case for a violation of duty (which the demurrer admits to be rightly described) with knowledge of the facts; for the scienter is sufficiently alleged, and, if informally, the objection at most is only one which must be shewn as cause of demurrer. Then the general rule applies, that a party neglecting a duty must make good the damage arising from such neglect. *Tarlton v. Fisher* (a) was an action of trespass by the party privileged; and it was held that the omission of the sheriff to take notice of the privilege could not make him a trespasser. Here the action is case for arresting with notice that the party was privileged; and the plaintiff is a third party injured by the neglect of duty. *Stokes v. White* (b) was in case: but there the action was brought by the party arrested; and all that the Court decided was that the original plaintiff was not liable unless he knew of the privilege: and there Lord Lyndhurst, on *Tarlton v. Fisher* (a) being cited, referred (c) to the conclusion of Lord Mansfield's judgment, as shewing that the question was still open, whether an action on the case, if knowledge were shewn, was maintainable. *Cameron v. Lightfoot* (d) was also trespass by the party arrested: some of the dicta in the judgment, indeed, appear to bear upon the present question; but they are extra-judicial. As to the argument that the sheriff is not bound to take notice of the privilege, he surely must take notice of all which comes to his knowledge. The sheriff acts at his peril. If he arrest a member of parliament or a peer, he is punishable: so

(a) 2 Doug. 671.

(b) 1 C. M. & R. 223. S. C. 4 Tyrwh. 786.

(c) 1 C. M. & R. 229. 4 Tyrwh. 797. (d) 2 W. Bl. 1190.

if he were to arrest an officer of this Court, it would be a question whether he had such knowledge as to make the act a contempt. Then, as to the objection that the declaration does not shew the nature of the privilege. It does state that the defendant attached *Jeyes* by his body, he being *then* privileged and protected from being so attached, and the defendant well knowing the premises. This is a sufficient allegation: it comprehends the case, for instance, of an arrest of the party while actually before the commissioners of bankrupts. The quantum of damage is immaterial. But the damage is properly laid. The plaintiff had a right to the proper execution of the writ of attachment, whether the money was or was not to come immediately to her hands: the sheriff, at any rate, is not entitled to object the want of interest. Nor can he say that he had no means of executing properly. Then the attachment expires without taking effect; and the plaintiff is obliged to sue out another writ. As to the expense of opposing the discharge, there may be more difficulty. Yet it seems that the plaintiff was entitled to endeavour to give effect to the sheriff's proceeding under the writ.

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Peacock, in reply, was stopped by the Court.

LORD DENMAN C. J. It is clear that this declaration is bad. The expression "privileged and protected from being so attached" shews merely that the party who uses the words thinks that there was a privilege from arrest. There is no question more doubtful than those relating to such privileges; and facts should be shewn to have existed, constituting such a privilege. The declaration, therefore, does not shew a foundation
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for the action. It also appears to me to be defective for not shewing that the plaintiff had an interest in the detention of the party. It is not enough to shew that the plaintiff had a claim made against her in chancery, and that the defendant was in contempt by disobeying an order made in the suit: the plaintiff should shew a reasonable ground for presuming that the money would come into her pocket. There may be also other objections to the declaration.

LITLEDALE J. I think the declaration is bad, on general demurrer, for not stating the nature of the privilege. It might be a privilege under the allowance of the Commissioners of bankrupts, or in the character of an officer of the Court, or of a party attending the Court: there is an infinite number of cases in which it might be doubtful whether there was a privilege or not. It should be shewn that there is a privilege which the law allows. The sheriff's duty is to execute the writ; and this he must not neglect. Therefore the party complaining must shew a particular fault in violation of the primary duty. There are several other defects in the declaration. I think no distinct cause of action is shewn.

PATTERSON J. I am also of opinion that the declaration is bad, for the reasons given. The defendant had a right to expect that the declaration should shew what the privilege was. For, notwithstanding the discharge by the Court of Chancery, the defendant had a right to take a traverse on the facts in the declaration, or to take the opinion of the Court upon them, or to allege new facts. I do not say that the declaration is

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not bad for many other reasons also : I think it is. It is a case of first impression ; and I doubt whether the action lie.

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WILLIAMS J. I quite agree. If the defendant be chargeable at all, the declaration should shew that the nature of the privilege was such as to prevent the ordinary duty of the sheriff from attaching.

Judgment for defendant.

WATSON *against* WILKS.

Tuesday,
May 31st.

ASSUMPSIT on a promissory note, made by defendant, payable to plaintiff or order, on demand. Plea, that the note was made and delivered to plaintiff for and in consideration of certain money and goods then agreed by plaintiff to be thereafter lent, advanced, and supplied to defendant : and that plaintiff had not lent, &c. Replication, That defendant broke his promise without the cause in his plea in that behalf alleged. Demurrer, assigning for cause that the replication ought to have traversed, or to have confessed and avoided, one or more of the facts stated in the plea, in express words ; that, if meant for the general replication de injuriâ, it was informal for omitting to state that the cause of action arose of the defendant's own wrong ; and that it was too large and general. Joinder in demurrer.

In an action by the payee of a promissory note against the maker, defendant pleaded that the note was made and delivered to plaintiff in consideration of money and goods then agreed to be thereafter lent and supplied by plaintiff to defendant, but that plaintiff had not lent or supplied, &c. Replication, " That the defendant broke his promise without the cause in his plea in that behalf alleged : " Held good, on special demurrer.

Wightman for the defendant. The replication puts in issue the agreement to lend the money and supply the goods, the fact that such agreement was the consider-

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ation for the note, and the fact that the plaintiff did not so lend and supply. Those are all facts to which the plaintiff was privy. In *Crogate's Case* (a) it was laid down that, although a mere excuse (which may be matter to which the plaintiff is not privy) may be replied to by *de injuriâ*, yet a plea of authority from the plaintiff cannot be so replied to. The reason is, that the plaintiff is privy to the fact, if true. [*Patteson J.* The recent cases in the Common Pleas and Exchequer were much discussed; and they go the length of deciding that, where a plea to a declaration on a bill of exchange or promissory note rests on mere excuse, the replication *de injuriâ* is not only allowable, but the proper replication.] That appears to be the effect of *Griffin v. Yates* (b). And in *Isaac v. Farrar* (c) the replication *de injuriâ* was held good. But, in the former case, the excuse in the plea rested on some matter to which the plaintiff was not privy. In *Solly v. Neish* (d) it was held that a plea, in *assumpsit*, which amounted to a denial of the promise, or a claim of interest in the defendant, or an assertion of authority from the plaintiff, could not be replied to by *de injuriâ*.

Armstrong contra. This is merely a plea of failure of consideration. (He was then stopped by the Court).

Per Curiam (e),

Judgment for the plaintiff (g).

(a) 8 Rep. 67 a.

(b) 2 New Ca. 579.

(c) 1 M. & W. 65. S. C. Tyrwh. & Gr. 281.

(d) 2 C. M. & R. 355. S. C. 5 Tyrwh. 625.

(e) Lord Denman C. J., *Littledale, Patteson, and Williams* J.

(g) See the note to *Crogate's Case*, in *Smith's Leading Cases*, 55.

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SNOOK *against* MATTOCK, Executor of
SOUTHWOOD.Tuesday,
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ON a motion for a mandamus to the lord of the manor of *Taunton Dean*, in *Somersetshire*, to receive certain customary surrenders, this Court directed a feigned issue, to try whether certain alleged customs existed in the manor. On the trial of the issue (*Snook v. Southwood*) at the *Exeter* summer assizes, 1826, before *Littledale J.*, a verdict was found for the plaintiff, subject to the opinion of this Court upon a special case, which was argued and decided in *Easter* term (*April* 30th) 1831. The question stated in the case was, whether upon the evidence, as set out, the plaintiff was entitled to retain the verdict on any, and which, of the issues; and the only point contested on the argument was, whether the evidence sufficiently proved the customs. The Court (a) was of opinion that the customs were fully proved (b); and the *postea* was ordered to be delivered to

On a feigned issue directed by the Court of King's Bench to try the existence of certain customs, the plaintiff had a verdict, subject to the opinion of the Court on a special case, the question being, whether the customs, as stated in the declaration, had been sufficiently proved at the trial. The Court having given judgment for the plaintiff, error was brought in the Exchequer Chamber, on the ground that the customs, as stated in the

declaration, were not legal customs. The Court of Exchequer Chamber quashed the writ, on the ground that error did not lie on a feigned issue.

Quære, by the Court of K. B., whether the Exchequer Chamber had power to quash a writ of error returnable in the latter Court:

Held, in K. B., that, on *sci. fa.* to revive a judgment against an executor, it is not a good plea that a writ of error is depending on the judgment.

Agreed, in K. B., that there may be an immemorial custom in a manor to surrender lands in trust.

(a) Lord *Tenterden C. J.*, *Littledale*, *Parke*, and *Patteson Js.*

(b) The customs which were the subject of the issue were stated in the declaration as follows:—

1. " That the lord of the said manor for the time being should accept, and pass and enrol, or file, in a certain muniment or record room of the said manor, at the request of any customary tenant of the said manor, all

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to the plaintiff. The defendant had died before judgment; but leave was given to enter judgment nunc pro tunc, as of *Easter* term 10 G. 4.; and it was so entered, upon all the counts of the declaration. In *Easter* term 1833, the plaintiff sued out a scire facias against the

surrenders made by such tenant of his customary tenements holden of the said manor, to the use of one or more surrenderees or surrenderers and his or their heirs and assigns for ever, according to the custom of the said manor, in trust for such other person or persons, and for such purposes, as were by such customary tenant named, expressed, and declared in and by such surrenders."

2. "That the lord of the said manor for the time being should accept and pass, and enroll or file in a certain muniment or record room of the said manor, at the request of any customary tenant of the said manor, all surrenders made by such tenant of his customary tenements holden of the said manor to the use of one or more surrenderees or surrenderers, and his or their heirs and assigns for ever, according to the custom of the said manor, in trust for such other person or persons, and for such purposes, as were by the said customary tenant expressed and declared, or to be expressed and declared, in any deed or indenture mentioned and referred to in and by such surrenders."

3. "That, where any tenant of the said manor had surrendered his customary tenements holden of the said manor to the use of one or more surrenderee or surrenderers, and his or their heirs and assigns for ever, according to the custom of the said manor, in trust for such other person or persons, and for such purposes named and expressed and declared, or to be named expressed and declared, in any deed or indenture in such surrender mentioned or referred to, the lord of the said manor for the time being should, at the request of such customary tenant, receive and keep in a certain muniment or record room of the said manor the deed or indenture containing the uses or trusts upon which such surrender had been so made as aforesaid."

Coleridge, in arguing the special case for the plaintiff, contended that, although trusts, as now used, were generally understood to have been introduced after the Statute of Uses, 27 H. 8. c. 10., it was not to be presumed that the practice of conveying property in trust might not have existed in this country, especially in a manor, from time immemorial, and might not, therefore, be the subject of a custom; and he referred to Lord Bacon's *Reading on the Statute of Uses*, and the history of trusts in 1 *Sanders on Uses*, c. 1. s. 3. (p. 7. 4th ed.). *Manning*, contra, did not contest the above proposition; and the case was discussed wholly on the effect of the documentary and other evidence, with which the Court was satisfied.

defendant

defendant *Mattock*, *Southwood*'s executor, to revive the judgment. A declaration was delivered, stating the issue of two writs, with returns of nihil. Before the return of the second writ of sci. fa., the defendant had sued out a writ of error on the original judgment, to the Exchequer Chamber; and he then pleaded (*May* 18th 1833), in bar of the sci. fa., that, after the judgment, and before the return of the second sci. fa., viz., *April* 30th 1833, he, for reversing the said judgment, sued out a writ of error, which was delivered to the Chief Justice of King's Bench before the return of the second sci. fa., and was still depending.

The writ of error came on for argument in *Easter* vacation 1834 (*a*); and the objections relied upon by *Manning* for the plaintiff in error were, that the customs alleged in the declaration were bad in law, or that, if consistent with law, they were not customs. *The Court* thought that the writ of error could not be entertained, this being a feigned issue, in which the proceedings were shaped under the direction of the Court below by consent of the parties, and the issue settled by agreement between them. They doubted, however, as to the course to be adopted with respect to the writ, and recommended an application to the Court of King's Bench, that Court (under stat. 11 *G.* 4. & 1 *W.* 4. c. 70. s. 8.) still keeping possession of the record (*b*).

In the ensuing *Trinity* vacation, the case was again mentioned in the Court of Exchequer Chamber (*c*), by

(*a*) *May* 10th. Before *Tindal* C. J., Lord *Lyndhurst* C. B., *Park*, *Gaselee*, and *Bosanquet* Js., and *Bolland* and *Gurney* Bs.

(*b*) *Follett*, for the defendant in error, referred to *Wright v. Doe dem. Tatham*, 1 *A.* & *E.* 5. note (*a*).

(*c*) *June* 23d. Before Lord *Lyndhurst* C. B., *Park*, *Gaselee*, and *Bosanquet* Js., and *Parke* and *Rolland* Bs.

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Follett, for the defendant in error, who stated that the Court of King's Bench had been applied to, but had declined to interfere. He, therefore, moved that the writ might be quashed. [*Parke* B. Has it been decided that error cannot be brought on a feigned issue? We have entertained a bill of exceptions on such an issue]. This is a writ of error upon the record which the Court of King's Bench is supposed to have framed. [*Lord Lyndhurst* C. B. In the case of a bill of exceptions, the question arises upon something occurring at the trial, independent of the record. We ought, however, to have the authorities brought before us. My impression was and is, that a writ of error will not lie in this case; still, the question how we ought to proceed requires consideration. *Bosanquet* J. The Courts give leave to sue out execution notwithstanding a writ of error, where it has been improperly brought. Might not an application be made now to the Court of King's Bench, for leave to proceed notwithstanding the writ?] The defendant in error will not obtain his costs of the writ unless it is quashed.

LORD LYNTHURST C. B. This is an issue directed by the Court of King's Bench, for the purpose of informing the conscience of that Court, by ascertaining a fact through the medium of a jury. After such an issue has been tried, the form of it is made the subject of a writ of error. We will take upon ourselves to quash the writ. The case of a special verdict, or a bill of exceptions upon a feigned issue, is very different.

The rest of the Court concurred; but, the counsel instructed on behalf of the plaintiff in error being absent,

sent, no judgment was finally given till the ensuing *Michaelmas* term, when the Court quashed the writ.

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The plaintiff in the sci. fa. then (*February* 17th 1835) replied to the above-mentioned plea, that, after the prosecuting of the writ of error, to wit on &c., the Chief Justice of K. B. sent to the Court of Error a transcript of the record, &c., and also the writ of error, and such proceedings were thereupon had, that afterwards, to wit &c., the Court of Error quashed the writ, and the same became and was determined, and the judgment was and still remains in full force and affirmed. Verification.

The defendant demurred (*February* 21st 1835), assigning several causes, and, among them, that, "a writ of error being a writ of right and not of grace, the Court of Exchequer Chamber had no authority to quash the writ of error; and that no right to quash a writ of error, quia improvidè emanavit, is vested in the Court in which such writ is returnable, or in any other Court than that out of which it issues."

In *Easter* term 1835 *Butt* obtained a rule calling upon the defendant to shew cause why his plea should not be taken off the file, and why the plaintiff should not be at liberty to sign judgment. The Court granted a rule nisi for taking the plea off the file only. In *Michaelmas* term (*November* 10th), 1835,

Manning shewed cause. The plaintiff, at all events, comes too late, this plea having been pleaded so long ago as *May* 1833. He has now replied, and the replication has been demurred to; if the plea is bad, he will

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have judgment. The plea, however, is good. In *Christie v. Richardson* (a), where an action was brought upon a judgment, pending a writ of error upon that judgment, the Court granted a stay of proceedings pending the writ. If the Court will, ex officio, stay proceedings on account of a writ of error, à fortiori a defendant may plead it. In *Benwell v. Black* (b), the plaintiff having obtained judgment, the defendant brought error: pending the writ, the plaintiff brought an action on the judgment, recovered, and sued out execution; and this Court, on motion, set the execution aside.

Butt, contrà. No other safe course is open to the plaintiff than to make this application, the plea having become immaterial. If the plea was good in itself, when pleaded, it may be questioned whether the subsequent matter can render it bad, although, by that matter, it has become, in effect, a false plea. The consequence will be that, notwithstanding this objection, the plaintiff must issue a new sci. fa. [*Patteson J.* Is it clear that the plea is good? It is said in 1 *Tidd's Practice*, 530, 9th ed., that a writ of error does not prevent the plaintiff from proceeding by sci. fa.] *Com. Dig. Pleader* (3 L 10.), *Rowley v. Raphson* (c), *Sampson v. Brown* (d), *Bac. Abr. Supersedeas*, D. 5. (e), are among the authorities on the point: and they are certainly somewhat contradictory. If, however, it be even a doubtful question, it is hard that the plaintiff should be put to the expense of arguing a demurrer. In the case of a plea manifestly false, the Court has allowed a plain-

(a) 3 T. R. 78.

(b) 3 T. R. 643.

(c) *Skinn.* 590.(d) 2 *East*, 439.

(e) Vol. vii. page 492. 7th ed.

tiff to sign judgment as for want of a plea; *Richley v. Proome* (a). [*Patteson* J. If this be originally a good plea, but is vitiated by matter subsequent, would not *audita querelâ* lie? In cases where that would lie, the Court has been in the habit of relieving on motion.] It is doubtful whether an *audita querelâ* would lie; no authority has been found for it.

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LORD DENMAN C. J. We have no power to make this rule absolute.

PATTESON J. The defendant had a right to plead the plea; and I do not know that the Court can say, from matter subsequent, that such plea should be taken off the file.

WILLIAMS and COLERIDGE Js. concurred.

Butt then asked that the proceedings might be stayed, without costs, and the plaintiff be at liberty to bring a new sci. fa.

Per Curiam. We cannot order that.

Rule discharged without costs.

The plaintiff afterwards joined in demurrer; and the demurrer now came on to be argued.

Manning, for the defendant. The replication is bad, for the court of error had no authority to quash the writ. [On this point, he contended that, although the Court of Exchequer chamber was the authority by

(a) 1 B. & C. 286.

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which the writ ought to be quashed if that proceeding were taken, yet the cases did not warrant quashing the writ unless for error on the face of it; in which part of the argument he cited *Viscount Say and Seal v. Stephens* (a), and *Lloyd v. Skutt* (b); and that the court of error could not know judicially in this case, from the form of the issue, that it was a feigned one; that, if there was any available objection, the plaintiff below should have moved to have the allowance of the writ of error set aside, which he contended must have been the course taken in *Baddeley v. Shafto* (c). The argument on this point is not further detailed, as the Court gave no judgment on the replication.] It will be contended that the plea is bad, because it is laid down in 1 *Tidd's Practice*, 530 (d), that, although a writ of error is a supersedeas, it does not prevent the plaintiff from proceeding by sci. fa., or action of debt on the judgment, against the principal. That is too broadly stated. It is true in the case of debt on the judgment, or sci. fa. against the bail; but in the case of a sci. fa. calling on the principal to shew why execution should not issue against him on the judgment, what can be a more direct answer than to shew a writ of error allowed to the principal upon that judgment? And if, in any case, the Court will stay proceedings pending a writ of error (e), the pendency of such writ must, in such case, be fit matter for a plea.

Butt, contra. There is no authority for this plea. A writ of error prevents the sheriff from proceeding to execution, but is no bar to a sci. fa. The course of practice has always been, not to plead the pendency

(a) *Cro. Car.* 135, 142.(b) 1 *Doug.* 350.(c) 8 *Taunt.* 434.

(d) 9th ed.

(e) See page 244, ante.

of the writ, but to move for a stay of proceedings; *Entwistle v. Shepherd* (a), *Christie v. Richardson* (b), *Pool v. Charnock* (c), *Benwell v. Black* (d). In *Com. Dig. Pleader* (§ L. 10.) it is said that to a *scire facias* the defendant cannot plead error pending of the same judgment; and *Dighton v. Granvil* (e) is cited, where the Court said that "it has been held that 'a writ of error pending' was a good plea in abatement to such a *scire facias*" (for reviving a judgment). "But of late days that has been overruled." Mr. *Tidd*, in stating that a writ of error does not prevent the plaintiff from proceeding by *sci. fa.*, makes no distinction between that and the action of debt on the judgment; nor is there any in principle. In *Godwin v. Goodwin* (g) a plea in abatement, to debt on a judgment, of a writ of error pending, was held bad; and *Parker C. J.* said, "It has been thought a very hard thing, that while the judgment was in dispute, the plaintiff should go on to recover this way. It has been attempted every way, that could be thought on, to put a stop to this way of proceeding; sometimes by pleading it in bar to such an action, sometimes by pleading it in abatement, and sometimes by pleading it as a temporary bar only; but it has nevertheless been adjudged, that the action did lie (h)." In *Rowley v. Raphson* (i) (where, to debt on a judgment, it was attempted to plead a writ of error in bar, *quousque* the cause should be determined in error) *Holt C. J.* is represented to have said that, if a *scire*

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(a) 2 T. R. 78.

(b) 3 T. R. 78.

(c) 3 T. R. 79.

(d) 3 T. R. 643.

(e) 4 Mod. 248.

(g) 20 Vin. Abr. 69. tit. *Supersedeas*, (B.) pl. 12.(h) See the other authorities cited, 20 Vin. Abr. *Supersedeas*, (B.) pl. 4. and pl. 10, 11.(i) *Skinn.* 590. Cited, *Com. Dig. Pleader* (§ L. 12.), p. 762.

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facias had been brought, "a writ of error pending, might be pleaded in bar of the execution:" but the judgment of the Lord Chief Justice is very shortly stated; and the dictum is extrajudicial. If the present plea would be good in abatement, or as a temporary bar (although it is difficult to understand what is meant by this last expression), it is not so pleaded. The defendant would not have been damnified if the plaintiff had obtained judgment pending the writ of error, because no execution could have issued till the writ had been disposed of.

Manning, in reply. If no execution could have issued, it is clear that a sci. fa. to have execution is useless pending the writ of error. If the plea would be good in abatement, or as a temporary bar, the Court would give the proper judgment though the prayer of judgment were informal.

LORD DENMAN C. J. I think that upon numerous authorities this plea is bad. It is admitted that such a plea would be bad in an action of debt on the judgment; and I think it is so on scire facias. The opinion attributed to *Holt* C. J. in *Rowley v. Raphson* (a) was not necessary to the decision of the case, and may not be correctly stated. Perhaps it may be that, upon the scire facias, execution could not be immediately carried into effect, on account of the writ of error; but the plaintiff, if he obtained judgment on the scire facias, would at all events have made the executor party to the original judgment, and might take the best advantage he could of the situation in which he had placed himself.

(a) *Skin.* 590.

LITLEDALE J. It is unnecessary to decide any thing as to the power of the court of error to quash the writ. The plea is bad. The writ of error suspends nothing but execution, and cannot be a final bar to a proceeding by scire facias. I do not understand what is meant by a plea in temporary bar. The defendant should have applied to the Court to stay proceedings, rather than have adopted the present course.

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PATTESON J. The plea, to a scire facias, of a writ of error pending, is clearly bad. It is contended that the writ is an answer, because the scire facias calls upon the defendant to shew why the plaintiff should not have execution, and prays that execution may issue, whereas the writ prevents execution; and the Court cannot both award it, and say that it shall not be enforced. But the object of the scire facias is to make the executor party to the judgment; and the Court, in awarding execution as prayed, does not say that it shall be immediately enforced. And I do not understand that any thing more is prevented by the writ of error. Both in scire facias and in debt on the judgment, the pendency of a writ of error is a bad plea, because it is not an entire answer; non constat what may be done upon the writ of error hereafter. If the plea were held good in bar, and the plaintiff in scire facias succeeded in the court of error, there would be an evident injustice: so if it were held good in abatement. I do not understand what is meant by a temporary bar, though the expression is used in the books. It is unnecessary to give any opinion on the power of the Court of Exchequer Chamber to quash the writ of error; as to which I entertain some doubt. But, if the writ were still

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still pending, there might be an application to this Court to stay proceedings.

WILLIAMS J. concurred.

Judgment for the plaintiff.

Wednesday,
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The KING *against* The Inhabitants of
WISTOW (a).

By an inclosure act, certain allotments were made to the parson, as a compensation for the uninclosed glebe lands of his rectory, and for all rights of common belonging to the rectory; and it was enacted, that the commissioner for inclosure should ascertain the yearly value of all the tithes on the lands to be inclosed, and the ancient inclosed lands, and that the tithes should be deemed equal in value severally to one fifth, one seventh, and one eighth of the annual net value of different classes of lands respectively, and a corn rent be assigned to the parson, equivalent to the annual value of the tithes:

ON appeal by the Reverend *George Mingaye*, rector of the parish of *Wistow, Huntingdonshire*, against a poor rate for the said parish, wherein he was rated for his corn rents or composition for tithes, the sessions (*January 1835*) quashed the rate, subject to the opinion of this Court upon the following case:—

Before 1830, the appellant was entitled, in right of his rectory, to the tithes of corn, grain, and hay, and all other great and small tithes arising within the parish of *Wistow*. On *May 3d 1830*, an act passed, 11 G. 4. and 1 W. 4. c. 5. (Private), for inclosing lands in the parish of *Wistow*, and for extinguishing the tithes therein, which act was to be considered as part of the case.

Sect. 25. enacts that the commissioner for enclosure, by the act appointed, “shall and he is hereby required, within twelve months next after the passing of this act, to ascertain and distinguish *the yearly value of all the tithes*, and of all moduses, compositions, and other

Held, that the parson was rateable to the poor in respect of such corn rent.

(a) See *Rex v. Nockolds*, 1 A. & E. 245.

payments

payments (if any) in lieu of tithes, which shall be arising, issuing, or renewing out of and from any of the said lands and grounds in the said parish of *W.* hereby directed to be divided, allotted, and inclosed, and out of and from all and every the gardens, orchards, and other ancient and inclosed lands and grounds in the said parish of *W.*, and due and payable to the said rector; and in making such valuation *the tithes* of all such lands and grounds hereby directed to be divided, allotted, and inclosed, and of all the ancient and inclosed lands and grounds, (except the inclosed fen lands and grounds,) as shall be arable, *shall be deemed equal in value to one fifth part of the annual net value of the said lands and grounds*; and *the tithes* of all such inclosed fen lands and grounds *shall be deemed equal in value to one seventh part of the annual net value of such inclosed fen lands and grounds*; and *the tithes* of all other lands and grounds in the said parish *shall be deemed equal in value to one eighth part of the annual net value of all such other lands and grounds*, after deducting the lands or grounds set out for roads, and the allotments hereinbefore directed to be set out for the purposes of getting stone, chalk, gravel, and other materials; and the said commissioner shall and he is hereby required in the next place," "to ascertain what has been the average price of a bushel (imperial measure) of good marketable wheat in the county of *Huntingdon* for the period of seven years next before the passing of this act, and shall in and by his award, or by some previous writing under his hand, and to be annexed thereto, ascertain and distinctly set forth what quantity and how many bushels of such wheat will in his judgment be equal to the *annual value of the said tithes*; and after
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such valuation and ascertainment, the said commissioner shall and he is hereby required to determine what sum of money will be equivalent to the value of the quantity of wheat so ascertained by him as aforesaid; and such sum of money shall be charged and apportioned by the said commissioner upon such lands and tenements of each and every proprietor, and in such manner as the said commissioner shall think just and equitable; and such sum of money, when so apportioned and charged, shall be issuing out of the lands and tenements which shall be charged therewith by the said commissioner, and shall be paid and payable by the person or persons who for the time being shall be in the occupation of such lands and tenements to the said rector and his successors for ever, (unless the same shall be altered by the ways and means hereinafter mentioned and provided,) by four equal quarterly payments, (that is to say,) on," &c., in "every year, the first payment whereof shall be made on the 25th day of *March* next after the execution of the said award," or such earlier day as shall be directed by such award, or previous writing, "and *the said rent* hereinbefore made payable shall be and is hereby declared to be *in lieu and full satisfaction and discharge of all and all manner of tithes*, both great and small, moduses, compositions, and other payments in lieu of tithes, arising, growing, issuing out of, and payable in respect of all the homesteads, gardens, orchards, open and common fields, meadows, pastures, commonable lands and waste grounds, ancient inclosed lands and grounds, and all other lands, tenements, and hereditaments whatsoever in the said parish of *W.* (except *Easter* offerings, surplice fees, and mortuaries); and from and after the appoint-

appointment of the said rent as hereinbefore provided, or at such other time as the said commissioner by any writing under his hand shall fix and appoint, all and all manner of tithes, and all former moduses, compositions, and other payments (if any) in lieu of tithes, within the said parish of *Wistow*, shall cease, determine, and be for ever extinguished; but in the meantime the said rector and his successors respectively shall be entitled to such tithes as he or they would have been entitled to if this act had not been passed" (a).

The commissioner, by writing under his hand and seal, dated *October 3d 1832*, ascertained and set forth the quantity of wheat in his judgment equal to the annual value of the said tithes (the quantity being estimated according to section 25.), and determined the sum of money equal to the quantity of such wheat, and thereby charged and apportioned such sum of money upon the lands and tenements of each and every proprietor in the proportions set forth in the schedule to such writing. And he thereby directed and appointed the first quarterly payment of such sums of money or rent to be made on the 25th of *December* then next, and fixed and appointed that all and all manner of tithes, and all former moduses, compositions, and other payments, if any, in lieu of tithes, within the said parish, had ceased, determined, and were for ever *extinguished*, at and from the 29th of *September* then last past. The commis-

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(a) Sect. 24. enacts, "that the said commissioner shall allot and award unto and for the rector of the parish of *W.* aforesaid for the time being, and his successors, such share or proportion of the lands by this act authorised to be inclosed, divided, and allotted, as shall in the judgment of the said commissioner be a full equivalent and compensation for the uninclosed glebe lands of the said rectory, and for all rights of common belonging to the said rectory in, upon, and over the lands and grounds hereby directed to be divided, allotted, and inclosed."

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sioner's general award was signed on the 17th of *January* 1833, the previous writing of *October* 3d 1832, being annexed thereto. The appellant has ever since been, and is now, in receipt of the amount of the said corn rent in lieu of his former tithes, and, in *October* 1834, was rated to the poor in respect of such corn rent.

The question for the opinion of the Court was, whether the rector was liable to be rated in respect of such corn rent.

Sir *John Campbell*, Attorney-General, and *Gunning*, in support of the order of sessions. The extinguishment of tithes by means of a commutation for a corn rent may be effected upon either of two principles. First, the tithes may be declared to be worth a certain proportion of the gross value of the land. Then the corn rent, which represents that proportion, ought to be subject to the poor rate; because the rector there receives what the legislature considers an equivalent for the one-tenth of the gross produce to which he was formerly entitled, and for which he was rateable; and the land-holder of course retains that which is equivalent to the nine-tenths only of the gross produce, and pays the poor rate on such nine-tenths only. Secondly, the net value of the land, after deducting the poor rates on the whole value of the land, may be ascertained, and the proportion which the rector's corn rent is to bear to such net value declared. In that case the corn rent should not be rated to the poor, because the rector gets an equivalent, not for his share of the gross produce, but for his share in so much of the gross produce as would remain after deducting the whole poor rate due on the whole gross produce. The rate due upon his share of the land has been already deducted from the

the integer upon which his proportion is estimated; and, if he were to be rated on that proportion, he would be taxed to the poor twice. Now this second principle is the one adopted by the legislature in the present case, the tithes being deemed equal in value to certain proportions of the "annual net value" of the respective sorts of land. The net value must be that which remains after deducting, among other things, the poor-rate. In *Chatfield v. Ruston* (a) a corn rent in lieu of tithes, was made payable "free and clear from all rates, taxes, and deductions whatsoever;" and it was held that such corn rent was not rateable in the hands of the parson. The same decision was come to in *Mitchell v. Fordham* (b), where the words were, "free from all taxes and other deductions whatsoever, except the land tax." Here, in effect, the deduction is to be made, in the first instance, from the gross produce; which is equivalent to directing a payment of the corn rent without deduction. No other meaning can be attached to the word "net." In *Rex v. Adames* (c) it was held that, as the poor-rate is to be taken on the net rent which a tenant at rack rent would give for the land, he having to pay all outgoing, a tenant whose lands were liable to a sewer's rate was entitled to be rated lower than the tenant of lands of the same value, not so subject. If a net rent imply the deduction of a sewer's rate, "annual net value" implies the deduction of the poor-rate. This view is fortified by the construction put upon the words "worths and values" in *Rex v. The Hull Dock Company* (d), and by the principle laid down for estimating the annual profits in *Rex v. Lower*

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(a) 3 B. & C. 863.

(b) 6 B. & C. 274.

(c) 4 B. & Ad. 61.

(d) 3 B. & C. 516.

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Mitton (a). In *Rex v. Lacy* (b) the rent was not estimated on the net value of the lands, and was held liable to a high rate: that was because the only argument for the exemption was, that the commissioners were to ascertain the net value of the tithes and affix a clear annual rent in lieu of them; and the Court thought that the only deduction contemplated was the expense of collection. Such an interpretation cannot be applied to the words "annual net value of the said lands." Besides, in that case, some allotments of land were made to the parson, and were not exempted from rate; and the Court thought it improbable that he should have been left liable for one species of property, and not for the other: and it is not clear that, if the argument had rested on the word "net," the decision would have been the same. In *Rex v. Bol-dero* (c) the parson was held rateable for the commutation rent: but there the estimate was made on the full value of the titheable lands; and it was probably with a view to that case that the word "net" was introduced into the act now before the Court. The provisions of the act were intended to prevent disputes between the clergyman and his parishioners; and therefore the value of the rates is deducted in the first instance, and a clear income assigned to him.

Sir *W. W. Follett* (with whom was *Pryme*) contra. The general principle, that a person is rateable to the poor in respect of rent paid to him in exchange for tithe which is extinguished, is not disputed on the other side, and is fully established; *Lowndes v. Horne* (d),

(a) 9 B. & C. 810.
(c) 4 B. & C. 467.

(b) 5 B. & C. 702.
(d) 2 W. Bl. 1252.

Rex v. Boldero (a), *Rex v. Lacy* (b). But it is said that the language of this act takes the case out of the general rule. It is true that, if the legislature declare that the rent is to be free from rates, taxes, or deductions, the person cannot be rated in respect of it; *Chatfield v. Ruston* (c), *Mitchell v. Fordham* (d). That is a necessary consequence of the express terms of the enactment: but no such terms occur here. It is said that the value of the tithe is estimated on a proportion of the annual net value of the titheable lands, and that such net value is taken after a deduction of the poor-rate on the whole. But it does not follow from this, that the value of the tithe, which is so estimated, is the value of such tithe after the poor-rate has been deducted from it. The gross value of the tithe, according to the act, bears a given proportion to a certain standard of comparison; whether that be the gross or net value of the land, cannot affect the question, whether the value of the tithe so estimated be the net or the gross value of such tithe. But, again, it is not even to be assumed that the rate on the tithe has been deducted from the gross value of the land. In *Rex v. Boldero* (e) Bayley J. says, "Then it has been urged, that in valuing the land the poor-rate would be deducted, and therefore the rector would, on that account, get a smaller sum, and ought not to be rated in respect of it. But there is a fallacy in that: for, before the statute, the land was charged with a poor-rate, payable both by the occupier and the tithe owner; and in the calculation by the commissioners, that part only which was payable by the occupier would

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(a) 4 B. & C. 467.

(b) 5 B. & C. 702.

(c) 3 B. & C. 863.

(d) 6 B. & C. 274.

(e) 4 B. & C. 472.

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be deducted; and unless the money in the hands of the rector were liable in the same manner as the tithes, a loss would be sustained by the parish." (He was then stopped by the Court.)

LORD DENMAN C. J. I am of opinion that the objection to this order is well founded. The value of the tithe may indeed depend upon the meaning of the words used in the statute, "annual net value of the said lands and grounds:" but it does not follow that it will affect the question of rateability, whether the land be valued with or without the deduction of the poor-rate. I do not know whether the legislature, if they had meant such a deduction to be made, would have estimated the tithe in this proportion. But I think it better to rest the decision on the more general ground, by the adoption of which we may hope to prevent future controversy. The proper principle is to be found in *Rex v. Boldero (a)*; that, if a sum of money be given to the parson, in lieu of tithes which were rateable, "that money will also be rateable, unless the liability is taken away by express words in the statute." That furnishes a safe rule; and, applying the rule to the present case, the corn rent, not being expressly exempted from liability, is rateable to the poor.

LITLEDAL J. The question turns on the expression, "annual net value." The poor-rate is to be deducted from the gross value of the land; but the parson's proportion of the net value will be still rateable. Suppose two parties to occupy land of precisely

(a) 4 B. & C. 471.

the same quantity and quality, requiring the same expense of cultivation, but the land of the one being tithe free, and that of the other not. In making a poor-rate, the occupier of the tithe free land would be assessed higher than the other; but the same quantity of poor-rate would be obtained from each land, because the tithe would be also rated, which is obtained from the land not tithe free. There the parson has one-tenth of the gross produce which he finds in the field after it has been cultivated; that tenth goes to his stack-yard, and he must pay the poor-rate on it. Here, instead of that tenth, he gets a certain proportion of the net annual value; that is, of the value of the land to the occupier. The occupier has to lay out so much in cultivation, before he gets the produce: this, and the poor-rate which he pays on his titheable land, will be deducted: then the question is, what he gets ultimately of the gross produce; that is the "annual net value." The parson, therefore, is not rated twice over. In general, net value would be that which is left after deducting, besides the deductions I have mentioned, the tithes also: but that construction cannot be adopted here. The poor-rate, therefore, if the parson be rated for the rent which he receives in lieu of the tenth of the gross produce, will be the same on the farm which is tithe free and on that which is not tithe free; as it ought to be.

PATTESON J. The last case on this question is *Mitchell v. Fordham* (a). There the question was, whether the enactment, that the corn rent should be "free from all taxes and other deductions whatsoever, except the

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(a) 6 B. & C. 274.

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land tax," exempted it from parochial taxes; and it was held that it did. That was in accordance with *Rex v. Boldero (a)*, where it was decided that whatever is substituted for tithe shall be rated, unless the liability be taken away by express words. Here it is said that the 25th section does take away the liability, by the words "annual net value of the said lands and grounds." Let us, therefore, consider the effect of the word "net," as here used. It is connected with the annual value of the land only, not of the tithe. The tithe is to be deemed to bear certain proportions to the annual net values of the several kinds of land. But it is not said that the net tithe is to be deemed to be in those proportions; and, as the legislature uses the word net in one case, and not in the other, I must suppose that different things are meant. Therefore the fifths, sevenths, and eighths of the annual net value of the respective sorts of land, are made equivalent to the tenth of the gross annual produce of such lands. How far such an estimate is just, I will not discuss. But, if this was not the meaning of the legislature, the expression should have been "net annual value of the tithes." It is said that the intention of the legislature was to exclude the risk of collision between the parson and the parishioners. In *Rex v. Lacy (b)*, Bayley J. places some reliance upon the circumstance that the rector's allotments were not exempted from rate. Here the same argument arises; for the rector has, by sect. 24., an allotment in lieu of the glebe, which is not exempted. In respect of that allotment, therefore, there must be the risk of collision.

(a) 4 B. & C. 467.

(b) 5 B. & C. 708.

WILLIAMS J. The question turns on a certain, and, if you please, an arbitrary mode laid down by the legislature for ascertaining the value of the tithe. Its yearly value is to be deemed to be in a certain proportion to the annual net value of the lands. If the proportion be too small, that is the fault of the legislature. Unless there be words expressly shewing that what is received in lieu of the tithe is to be exempt from rate, many cases have decided that the composition is to follow the fate of the tithe. Here there are no such words.

Order of sessions quashed.

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The KING *against* The Inhabitants of GREAT and LITTLE USWORTH and NORTH BIDDICK. *Wednesday, June 1st.*

ON appeal against an order of justices for the removal of *Caroline* the wife of *William Waddell* (who had deserted her), and their seven children, from the township of *Great and Little Usworth and North Biddick*, in the county of *Durham*, to the township of *Houghton le Spring*, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case.

William Waddell had gained a settlement in the appellant township; but he had subsequently rented, paid the rent for, and occupied for a sufficient time, a tenement of sufficient value to confer a settlement in the

W. rented and occupied the middle floor of a house. Two outer doors, and some steps, which gave access to that floor, were appropriated to him exclusively. A separate flight of steps on the outside of the house led, by a different outer door, to a passage on the middle floor, from which passage a tenant occupy-

ing the upper floor reached his premises, by a staircase of his own. One of *W.*'s rooms opened into this passage, and *W.* could not reach that room but by going up the last-mentioned steps, and along the passage, or by crossing the passage from his other rooms, by a door in one of them, which was usually locked. All the last-mentioned rooms communicated with each other, and with both the doors appropriated to *W.* :

Held, that the premises occupied by *W.* were "a separate and distinct dwelling house," within stat. 6 G. 4. c. 57., by renting which a settlement might be gained.

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township of *Painshaw*, in the county of *Durham*, in 1829 and 1830; and the only question in dispute was, whether the tenement in *Painshaw* was or was not a separate and distinct dwelling-house or building, within 6 G 4. c. 57.

The tenement was part of an entire house which consisted of three floors, viz., the ground floor, the middle floor, and the upper floor. The three floors were rented of the owner by three separate and distinct tenants. *William Waddell* rented and occupied the middle floor. The entrance to the ground floor was by a door in front, which was for the separate and exclusive use of the occupier of that floor: there was no internal communication between that floor and any other part of the house. The entrance to the middle floor was by a flight of steps on the outside in front: the ground behind was elevated so as to be on a level with the middle floor: and there was a back door behind, entering into the middle floor. Both these entrances were for the separate and exclusive use of *Waddell*, the occupier of that floor. Another flight of outer steps in front led to a passage on the middle floor, which terminated in a staircase: and this flight of steps, passage, and staircase, was the entrance to the upper floor. By means of internal communications *Waddell* could pass from his front to his back door, and from one room to another into all the rooms of his middle floor, except one very small room. *Waddell* had a locked door leading into the said passage immediately opposite the room in question, so that he could get to that room by merely crossing the passage which led to the upper floor: but he had the right of using the outer steps, and the whole of that passage, to enable

enable him to get access to it if he thought proper : but without using this passage in one or other of these ways he could not get access to that room. One roof covered the whole of the three floors.

The sessions decided, that *Waddell's* floor was a separate and distinct dwelling-house within the meaning of the act. The question for the opinion of the Court was, whether the sessions came to a right determination on that point.

R. V. Richards, in support of the order of sessions, was stopped by the Court.

Cresswell and *Ingham*, contra. If three floors compose a dwelling-house, and one is under-let, that floor is not a separate and distinct dwelling-house within the statute. [*Patteson J. Rex v. St. Nicholas, Rochester (a)*, and *Rex v. St. Nicholas, Colchester (b)*, shew only that a man must occupy the whole of that which he rents.] Supposing that an indictment for burglary would lie for breaking and entering these rooms, they might be a dwelling-house for that purpose, and yet not for the purpose of conferring a settlement under the statute. That distinction is adverted to in *Rex v. St. Nicholas, Rochester (a)*. The term, "actually occupied" in stat. 1 W. 4. c. 18., on which that case turned, and the words, "separate and distinct dwelling-house," in stat. 6 G. 4. c. 57., were introduced into those statutes to end disputes as to settlement where houses are partly occupied by lodgers, a purpose wholly different from those of the criminal law; and the statutes, in using those words,

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(a) 5 B. & Ad. 219.

(b) 2 A. & E. 599.

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point to a different definition of "dwelling-house" from that which prevails in criminal cases. The "dwelling-house" under stat. 6 G. 4. c. 57., must be separate and distinct, in the same sense as the "building;" the latter word is introduced only to meet the case of a warehouse which is not dwelt in. A floor in a warehouse, exclusively rented, would not be a separate building. Nor is a separate dwelling equivalent to a separate dwelling-house; if it were, any room which a person might lock up would give a settlement. To satisfy the statute, there must be a distinct roof: otherwise, in the present case, it may be said that there were three dwelling-houses, within the statute, under the same roof. If a dwelling-house may be separate in a different sense from that in which a building is so, then a party occupying chambers might gain a settlement if he slept in them, but not if he used them only for business. And, further, in this case, the tenement rented by *Waddell* was not even such a dwelling-house as might be the subject of burglary. It was a middle floor, with the privilege of passing to one of the rooms on that floor through a passage leading from the outside of the house to an upper floor occupied by another tenant: that passage was a part of the tenement, used by *Waddell*, not exclusively, but in common. The case states that *Waddell* occupied a tenement "of sufficient value to confer a settlement:" that is, he paid 10*l.* a year for the whole of the premises described. The passage, and the room which lay across it, cannot be left out of consideration.

Lord DENMAN C. J. I profess to follow the words of the statute as closely as possible: and I think I do so by saying that, in my opinion, this was a separate and distinct

distinct dwelling-house. It is not necessary to say more. 1836.

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LITLEDALE J. There were in this house three floors, and the access to each was by separate outer doors; I think therefore that each was a distinct tenement, and that *Waddell* occupied a separate and distinct dwelling-house within the statute. I do not think the case is altered by the convenience, which he enjoyed, of a right of access by the passage which has been spoken of to one of his rooms.

PATTERSON J. In *Rex v. Wootton* (a), which was decided partly on the authority of *Rex v. Iver* (b), (and in which it was held that the words "a separate and distinct dwelling-house," were not confined to a single dwelling-house), I said, as I now say, that "separate and distinct," in this statute, means, "separate and distinct as to any other person: that the tenant should not hold part of a house." Here the tenant held the whole; for the house was the floor.

WILLIAMS J. concurred.

Order of sessions confirmed.

(a) 1 A. & E. 232.

(b) 1 A. & E. 228.

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June 1st.

In the Matter of STOCKWIN.

If a party committed by a subdivision court in bankruptcy for refusing to answer, obtain a habeas corpus to be brought again before the court, and give notice that he is ready to answer, he is not entitled to a meeting for that purpose, without paying the costs of the sitting. Although he make affidavit of his inability to pay.

LUKE STOCKWIN was committed to Newgate, November 5th, 1835, by the commissioners forming a subdivision court of bankruptcy, acting under a fiat against one *Bernard Angle*, until he should submit himself to them, and answer questions to their satisfaction. In *Easter* term last, being still in custody, he obtained a habeas corpus to bring him before the commissioners of the Court of Bankruptcy constituting a subdivision court, to be holden at such time and place as they might appoint, to be then and there examined touching certain matters relating to the bankruptcy of *Bernard Angle*. A copy of the writ was served on the commissioners, with a notice from *Stockwin*, that he was ready and willing to be further examined concerning the trade, dealings, and estate of *B. A.*, and required them to appoint a day for such examination. The commissioners answered, that they would appoint a sitting for his further examination, upon his tendering to the solicitor under the fiat the costs of the sitting, which would amount to 3*l.* 5*s.* 4*d.* In this term, a habeas corpus was obtained to bring *Stockwin* before this Court, for the purpose of his immediate discharge; and, he being now in Court,

F. V. Lee moved for his discharge, on affidavits stating the above facts, and the party's inability to pay the costs. [Lord *Denman* C. J. It is admitted that he was properly sent to prison; he can be released only by a second decision of the commissioners. Is that to be

be obtained at the expense of the estate? Or can any body be called upon to pay it but the party himself?] He is unable; and may be perpetually imprisoned. And a part of the charge made is not for the actual expenses of the sitting. [Lord *Denman* C. J. If he had been prepared to pay the costs, we should have made the order for his coming before the commissioners, on payment of the necessary sum, whatever that might be, taking care that it should be the least that could be required. *Ex parte Baxter* (a) is in point, as to the principle.]

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In the Matter of
Strockwin.

Erle, contra. *Ex parte Baxter* (a) shews that the payment of costs in such a case is a part of the submission. [Lord *Denman* C. J. If a meeting be held for any other purpose, he may be brought up.] The order must be, that he stand remanded; and it will be understood that he shall have the earliest notice of an opportunity to come up.

LORD DENMAN C. J. That must be the course. The commitment was right; and the party has not put himself in a situation to be relieved from it.

LITLEDALÉ, PATTESON, and WILLIAMS Js. concurred.

Prisoner remanded.

(a) *Mont. & Mac.* 16, 21.

1836.

Wednesday,
June 1st.

The KING against The Vestrymen of
ST. MARY-LE-BONE.

By stat.
35 G. 3. c. 73.,
for the govern-
ment of the
parish of St.
Mary-le-Bone,
it was directed
that the vestry-
men should
annually make
a poor-rate and
other assess-
ments, and that
the rates to be
so made should
be entered in a
book or books,
which should
state the names
of the persons
to be charged,
the amount of
assessment
upon each per-
son for each of
such rates, and
the arrears out-
standing at the
end of each
year. The
entry of the

A RULE nisi was obtained in last *Michaelmas* term for a mandamus to the vestrymen of *St. Mary-le-bone* in the county of *Middlesex*, and *James Hugo Greenwell*, gentleman, their clerk, "to permit and suffer *Charles Hibble* (a), and all and every other person and persons rated to the relief of the poor of the said parish, and all other persons mentioned or referred to for that purpose by the statute made" &c. (referring to stat. 1 & 2 W. 4. c. 60.), "to inspect and take copies of, or extracts from, the rate books of the said parish, and all other books mentioned or referred to, and declared to be at all seasonable times open to such persons by the said act." The rule also called upon the vestry-clerk to shew cause why he should not pay the prosecutors the costs of this application.

It appeared, by the affidavit of *Hibble*, that the parish

rate, made as above, was the original rate. The act said nothing as to inspection by the rate payers. Such books were accordingly kept, and also books, under *Sir John Hobhouse's* act, (1 & 2 W. 4. c. 60.) s. 32., containing accounts of all sums of money received and disbursed for parochial purposes, and of the articles, matters and things for which the sums were received and disbursed; which latter books were open to inspection, and liberty given to take copies, according to the last-mentioned act; but these books did not contain the particulars stated in the book kept under the local act.

A rate payer demanded liberty to inspect and take copies of the first-mentioned books (not offering any payment); which liberty being refused, he obtained a rule nisi for a mandamus:

Held, that the Court was not authorised by the above statutes, or stat. 17 G. 2. c. 3., or at common law, to compel the granting of such liberty: And, therefore, rule discharged.

(a) Some discussion took place in the subsequent argument, on the propriety of the demand in the following part of the rule (as far as the words "statute made" &c.); but the decision of the case did not turn on this point.

of

of *St. Mary-le-bone* is governed according to Sir John Hobhouse's act, 1 & 2 W. 4. c. 60.; that *Hibble* was an inhabitant rated to the poor; and that he, as such inhabitant, on the 9th of *November* last, at the Court-house of *St. Mary-le-bone* (where the parish business is transacted, and where the vestry-clerk has his office), applied to Mr. *Greenwell*, the clerk, who has the custody of the books after-mentioned, and stated that he, as a rate-payer, intended to take copies of, or extracts from, the rate-books of the parish. Mr. *Greenwell* said that, according to a resolution which had been passed by the vestrymen, he could not allow him to take copies or extracts from the rate-books. *Hibble* desired him to consider of the application; and on a subsequent day he again applied for an inspection of the rate-books, and permission to take copies of and extracts from them. *Greenwell* stated that he would allow *Hibble* to inspect the books, but not to take copies or extracts, for the reason before given. *Hibble* then (after referring *Greenwell* to sect. 32. of stat. 1 & 2 W. 4. c. 60.) requested him to consult the vestrymen, and to inform them that *Hibble* would take legal proceedings, unless he heard from them or from *Greenwell*, within a certain time (now elapsed), that his demand was complied with. No intimation of compliance was given. The affidavit further stated that the vestry, at a meeting previous to the above transactions (*July* 4th 1835), passed a resolution, "That no person be allowed to copy from the rate-books; and that, agreeably to the thirty-second section of the Vestries Act, no person be allowed to inspect the books of the vestry, unless he or she be a rate-payer or creditor of the parish." *Hibble* also deposed that the vestry-clerk knew him, and was aware

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of his being a rate-payer; and that the rate-books belonging and relating to the parish, which *Hibble* applied to inspect and copy, were, at the time of the applications, kept at the Court-house by *Greenwell* as vestry-clerk; and that they contained an account of monies received for or on account of the rates or assessments made upon the inhabitants and occupiers for the relief of the poor and for such other purposes as are by law directed with respect to monies raised for the relief of the poor, and also for or on account of certain other rates and assessments made on the inhabitants, &c., for other parochial purposes. The affidavit suggested that compliance with the statute was refused for party or political purposes; and that the deponent required the extracts or copies for proper objects (*a*).

In opposition to the rule it was sworn, by the assistant vestry-clerk, "that the rate-books of the said parish do not contain a true and regular account of all or any sums of money received and disbursed for or on account of parochial purposes, nor of the several articles, matters, and things, for which such sums of money are received and disbursed;" and that, by order of the vestrymen, there is kept under his management, at the Court-house, "a book in which true and regular accounts are entered of all sums of money received and disbursed for or on account of parochial purposes, and of the several matters and things for which such sums of money are so received and disbursed: and that such book is at all seasonable times open to the inspection of every vestryman," rate-payer, and creditor, who may take copies of, or extracts from such book, without pay-

(*a*) It appeared, in the course of the discussion, that the application had reference to the act for amending the representation, 2 W. 4. c. 45. s. 27.

ing;

ing; and that the deponent had never refused inspection, or liberty to take copies, &c., of such book, to any vestryman, rate-payer, or creditor. Mr. *Greenwell* also stated that *Hibble* had never been refused by him, or applied to him for, liberty to inspect or take copies of, or extracts from, the last-mentioned book. He denied the political purposes imputed; and stated his belief that the resolution of the vestry was passed with a conviction that the said rate-books were not the books contemplated by the statute as those which were to be open to the inspection of the vestrymen, rate-payers, and creditors, and from which they might take extracts. It was also sworn that the rate-books for the current year are not kept at the Court-house, but by the rate collectors, to whom they are respectively delivered on or about *July* 1st in each year, and who keep them till the 30th of *June* following. In this term (*a*),

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Sir *John Campbell*, Attorney-General, shewed cause. This is an application erroneously made under stat. 1 & 2 *W. 4. c. 60. s. 32 (b)*. The book kept under that statute

(*a*) *May* 26th. Before Lord *Denman* C. J., *Littledale* and *Patterson* Js.

(*b*) Stat. 1 & 2 *W. 4. c. 60. s. 32*. "And be it further enacted, that the said vestry shall and they are hereby required to cause a book or books to be provided and kept, and true and regular accounts to be entered therein of all sums of money received and disbursed for or on account of parochial purposes, and of the several articles, matters, and things for which such sums of money shall have been so received and disbursed; which book or books shall at all seasonable times be open to the inspection of the said vestrymen, and of any person or persons rated to the relief of the poor of the said parish, and of any creditor or creditors on the same, without fee or reward; and the said vestrymen and persons and creditors as aforesaid, or any of them, shall and may take copies of or extracts from the said book or books, or any part or parts thereof, without paying anything for the same; and in case the clerk to

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statute contains an account of sums received and disbursed for parochial purposes, not of sums assessed; and as to that book there has been no refusal. Stat. 17 G. 2. c. 3. directs (s. 1) that "every rate for the relief of the poor" shall be published in church, and (s. 2.) that the churchwardens and overseers, &c., "shall permit all and every the inhabitants of the said parish, township, or place, to inspect every such rate at all seasonable times, paying 1s. for the same, and shall, upon demand, forthwith give copies of the same, or any part thereof, to any inhabitant of the said parish, township, or place, paying at the rate of 6d. for every twenty-four names." The application here is not for an inspection of the *rates*, nor has any payment been offered: the question, therefore, does not turn upon this statute. But, by the local act, 35 G. 3. c. 73., for the regulation of the parish of *St. Mary-le-bone*, as to the maintenance of the poor and in other respects, it is enacted, in sect. 179, that the vestrymen, after having ascertained the sums which they shall think sufficient for the relief of the poor, &c., for the current year, shall make five distinct and equal pound rates or assessments once in every year, or oftener if necessary, for the maintenance of the poor, &c., and that "all the rates to be made and assessed by virtue of this act shall be entered in one book or books to be provided for that purpose, in which book or books there shall

the said vestrymen, or other person with whom such books shall remain, shall on any reasonable demand refuse to permit or shall not permit the said vestrymen, persons, or creditors, or any of them, to inspect the said book or books, or to take such copies or extracts as aforesaid, such clerk or other person as aforesaid shall forfeit and pay any sum not exceeding 10*l.* for every such offence."

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be separate columns, one column for the arrears standing out the preceding year; one other column for the names of the several persons to be charged in the said rates or assessments, and other columns distinguishing the title of each of the said separate rates or assessments over against the name of every person so to be charged, one other column to contain the whole money charged and assessed upon such persons respectively for all the said rates or assessments, and one column for the arrears standing out and unpaid at the end of the year, in order to be carried on to the next succeeding account." This is not the book spoken of in stat. 1 & 2 W. 4. c. 60. s. 32.; it does not derive its origin from that statute, but existed long before; and the liberty of inspection and copying given by that statute cannot extend to it. Supposing that the parties applying in this case had made their demand conformably to stat. 17 G. 2. c. 3., that act does not give a right to inspect and take extracts from any book in which the rates may happen to be entered. Then reliance must be placed upon some general right in the rate-payers of a parish to inspect and copy every book which may be considered a parish book: but no such right can be proved to exist either at common law or by statute.

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Sir *W. W. Follett* and *Tomlinson* contra. This demand cannot legally be refused. The difficulty is raised by a political party in the parish, for electioneering purposes. [Lord *Denman* C. J. As the rule is framed, is not this, substantially, an application to inspect rate-books, and grounded on Sir *John Hobhouse's* act?] If there is a right independently of that act, the Court will still grant the mandamus. By stat. 35 G. 3. c. 73.

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s. 179., the rates for this parish, instead of being first made out in the usual manner and then copied into books, are made by entering them in the books kept as is there directed: the book is the rate (a), with the addition of an account, in separate columns, of the whole monies charged upon each person respectively for each rate, and of the arrears outstanding at the end of each year. There is no other book which contains this information. Stat. 1 & 2 W. 4. c. 60. s. 31. requires that a book stating the transactions of the vestry shall be kept, and sect. 32. enacts that the vestry shall keep a book containing true and regular accounts of all sums received and disbursed for parochial purposes, and of the several *articles, matters, and things* for which such sums shall have been so received and disbursed; and both sections give liberty to the rate-payers to inspect and take copies. The book referred to by the affidavit of the assistant vestry clerk, as kept by order of the vestrymen, does not furnish that information as to particulars of the parish receipts which is given by the rate-books; and, if the book so kept does not afford such knowledge of the articles, matters, and things mentioned in sect. 32. as the rate-payers were intended by that section to have, the book which does contain it should be also accessible to them, in the manner which the clause points out. There cannot be an effectual inspection under sect. 32. unless the whole set of documents is looked at. [*Patteson J.* Is there any clause giving inspection, in the local act?] There is not: but the rate-books are, in part, identical with the rates, and

(a) Sir W. W. Follett, in the course of the argument, stated that the book was signed by the justices who allowed the rate, there being no other document for them to sign.

the parishioners must have a general right to inspect the rates by which they are charged. That is independent of stat. 17 G. 2. c. 3., which confers no right, as to inspecting or copying, that did not already exist, but imposes penalties on officers refusing to permit the inspection or to give copies, which sect. 2. requires them to furnish on demand, if paid for. The refusal here is founded on an illegal resolution. The general right of inspecting rates by which the parties are charged is supported by *Rex v. The Justices of Leicester (a)*, where, upon the ground of such right, the Court, in the case of a borough-rate, ordered a mandamus to the justices and clerk of the peace to permit a person on behalf of parishioners within the borough to inspect and take copies of the last two rates or assessments for the borough, and all orders for the expenditure of the same rates, and the several orders of sessions made thereon. And a rule has been made absolute for a similar mandamus in *Rex v. The Justices of Staffordshire (b)*. [Lord Denman C. J. In moving for that rule, *Rex v. The Justices of Leicester (a)* was cited. We doubt whether that case was well decided, and are desirous of hearing it fully discussed (c).] At all events, the Court will not say that the inhabitants of this parish should be in a worse situation, from the particular manner in which their rate-books are kept, than the inhabitants of any other. [Littledale J. They have chosen to obtain a peculiar act of parliament; that may be its result. *Patteson J.* The statute 17 G. 2. c. 3.

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(a) 4 B. & C. 891.

(b) *Harr.* 277.

(c) The case was afterwards argued on return to the mandamus; and, in the judgment of the Court, *Hil. T. 1837, Rex v. The Justices of Leicester* was over-ruled as to the above point.

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authorises an inspection of "every such rate" (not of "the rates"), evidently meaning that the rate-payer shall be enabled to see that which is published in church on the *Sunday*. The entry of accounts, to be subject to inspection under stat. 1 & 2 W. 4. c. 60. s. 32., is quite a different matter. Then the peculiar provisions of the local act raise a difficulty which drives you to the general right]. The rate-payers have that right as to the rate; and, unless they inspect the other contents of the rate-books, they cannot effectually check the year's accounts, according to the intention of 1 & 2 W. 4. c. 60. s. 32. [*Littledale J.* By analogy to stat. 17 G. 2. c. 3., the application could not go further than to obtaining copies of the rate itself]. More was granted in *Rex v. The Justices of Leicester (a)*. [*Littledale J.* That case, if rightly decided, may assist you, so far as this application proceeds upon a common law right; but not with reference to the statutes]. The applicants rely upon the general right. [*Lord Denman C. J.* I think I have already stated, on the trial of a cause arising out of the disputes in this parish, that it was wrong to withhold the books from any respectable persons claiming as these parties do; and that I thought it was not the intention of the acts to give a political advantage to the vestrymen; but whether or not we have the power to interfere is a different question].

Cur. adv. vult.

LORD DENMAN C. J. now said: I have stated already what we considered to be right in this case with respect to the production of the books. But we are decidedly of

(a) 4 B. & C. 891.

opinion that, under the statutes which have been referred to, we should not be justified in granting a mandamus. The rule must therefore be discharged.

Rule discharged, without costs.

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DOE on the joint Demise of The Baron and
Baroness DE RUTZEN against LEWIS.

Thursday,
June 2d.

EJECTMENT for messuages and lands in *Pembroke-shire*. The demise was laid on the 19th of *November* 1831. On the trial, before *Williams J.*, at the *Brecknockshire* Spring assizes, 1835, the case opened for the plaintiff was that the defendant held of the lessors of the plaintiff, at an annual rent of 71*l.*, as tenant under a lease by which *William Knox* demised the lands to *John Morris* for certain lives, and which contained a covenant, on the part of *Morris*, his heirs, executors, and administrators, to repair, and keep in repair, at all times during the continuance of the demise, the said messuage or tenement, with all and singular the houses, &c., then made and erected, or which at any time during the continuance of the demise should be made or erected, upon the demised

A lease of lands, &c., by *A.* to *B.*, contained a general covenant by *B.* to repair, and a further covenant that *A.* might give notice to *B.* of all defects and want of repair, and, if *B.* did not repair the said defects within two months, *A.* might enter and do the repairs himself, the expense of which *B.* was to repay at the time of paying his next rent, and, if he did not do so, *A.* might distrain

on him for the expense, as in case of rent arrear. There was also a power to *A.* to re-enter upon breach of any covenant. The premises being out of repair, *A.* gave *B.* notice to repair within six months, and that, if *B.* did not repair within that time, he would perform the repairs and charge *B.* with the expense. The premises were not repaired within the six months. During that time, a negotiation was entered into by *A.* and *B.*; and, after the expiration of the six months, *A.* gave notice to *B.*, that, if he did not agree to certain terms in three days, *A.* would hold him to the covenants in his lease. *B.* did not agree.

Held, that *A.* could not recover in ejectment for a forfeiture, he having elected to perform the repairs and distrain on *B.* for the expense, and the general power to re-enter not being revived by the three days' notice.

Semble, that, where a power of re-entry for breach of covenant is reserved in a lease, and the reversion descends to coparceners at common law, one alone cannot maintain ejectment for breach of the covenant.

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premises, &c.; and, at the end or sooner determination of the demise, to yield up the premises in such like good repair, &c.; and that it should be lawful for *Knox* and his heirs or assigns, &c., at all seasonable times during the continuance of the demise, to enter upon the premises, there to view the state and condition thereof; "and, upon every such view (if he or they shall think fit), to give or leave notice in writing at the said hereby demised premises, or any part thereof, to and for the said *John Morris* and his heirs, of all defects and want of reparation then and there found; and, in case he or they shall neglect or refuse to repair the said defects within two calendar months after such notice or warning left or delivered as aforesaid, then it shall and may be lawful to and for the said *William Knox* and his heirs, or his or their agent, with workmen and labourers, to enter upon the said demised premises, and to do such repairs as he, they, or either of them shall think necessary to be done; and that the said *John Morris*, or his heirs, shall and will repay to the said *William Knox*, his heirs and assigns, so much money as shall be expended by him and them for work and materials in doing such repairs, at the time of paying his or their next half year's rent which shall become due after the said money shall have been so laid out and expended; and, in case the said *John Morris* or his heirs shall neglect or refuse to pay the same as aforesaid, then it shall and may be lawful to and for the said *William Knox*, his heirs or assigns, to enter the said premises, and to distrain for the same as in case of rent in arrear. Provided always that, if the said yearly rent of 71*l.*, or any part thereof, or any increase thereof, by breach of any covenant herein-before contained,

tained, shall be behind-hand or unpaid by the space of fifteen days next after any of the said days whereon the same is reserved and made payable (although the same shall not have been demanded)," "or if the said *John Morris* and his heirs shall not in all things well and truly perform, fulfil, and keep all and every the covenants and agreements on his and their parts to be performed" &c., "then or at any time thenceforth, in every or any of the said cases, it shall and may be lawful" &c. (covenant for re-entry by *Knox*, his heirs or assigns).

The lease was, according to the plaintiff's case, forfeited by breach of covenant to repair. It was proved that the defendant had stated that he held under the lease formerly held by *John Morris*, and that he had paid the rent mentioned in the lease, taking receipts expressed to be for rent due to both the lessors of the plaintiff; and that one of the lives was still existing. On cross-examination, it appeared that the reversion had been assigned by *Knox* to *Nathaniel Phillips*, since deceased, who left two sons and two daughters; that both of the sons had been in possession of the reversion, and had died unmarried; that the Baroness *de Rutzen*, the lessor of the plaintiff, was one of the daughters, and that the other daughter, the Countess of *Lichfield*, was still living.

It was further proved that, the premises having become out of repair, the defendant, being then tenant, received from the agent of the lessors of the plaintiff the following notice, directed to him, signed by the agent, and dated 10th *July* 1830. "Take notice, that on receipt of this you are required to fulfil all and every the covenants and agreements contained in your lease

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lease or leases granted to you on the messuage, tenement, and lands, called " &c. ; "and that, in case of your neglecting in anywise so to do, all and every building, hedge, &c., will be put in covenanted order and repair for you, and you be charged with the costs, &c. ; or, should there be any further breach of covenant, that it will affect the existence of your lease or leases." The repairs were not performed ; and, in *November* 1830, the defendant received the following notice, directed to him, signed by the agent, and dated 21st of *November* 1830. " As you have not, in pursuance of the notice served on you on the 10th day of *July* last, repaired the messuage, tenement, and lands, which you hold under the Baron and Baroness *de Rutzen*, situate in " &c., " I hereby give you further notice to repair the hedges, gates, and fences, on the said premises, on or before the 30th day of *December* next, and the houses, offices, and other buildings on the said premises, on or before the 31st day of *May* next ; and, in the event of your neglecting to make such repairs at such respective periods as aforesaid, I hereby, on the behalf of the said Baron and Baroness *de Rutzen*, give you notice that they will cause such respective repairs to be made, and charge you with the expenses of the same, according to the provisions in your lease or leases of the said premises for that purpose contained." Rent was received by the lessors of the plaintiff, from the defendant, which became due *Lady-day* 1831 ; but no later rent was received. It further appeared that, in *December* 1830, a negotiation was entered into between the lessors of the plaintiff and the defendant as to changing the situation of the farm-house and buildings, and re-building them

at

at the joint expense of both parties in lieu of the expense of reinstating the premises in their former state. In *August* 1831, the Baron *de Rutzen* gave a paper to the defendant, containing certain proposed terms of agreement on the matters above mentioned, and told him at the same time that, if he did not bring it back signed within three days, all negotiation must be at an end, and the defendant must be prepared to fulfil all the covenants in his lease. The paper was not signed by the defendant; and the present action was commenced in *November* 1831.

The defendant's counsel objected, first, that the present lessors of the plaintiff were not entitled to bring ejectment for the breach of the condition of the lease, inasmuch as it appeared that the Baroness *de Rutzen* was coparcener with the Countess of *Lichfield*; and, secondly, that the general right of entry for breach of condition had been waived by the lessors of the plaintiff having elected to proceed upon the particular proviso which enabled them to perform the repairs and charge the tenant with the expense. The learned Judge gave leave to the defendant's counsel to move for a nonsuit; and he desired the jury to find for the plaintiff, if they thought that the premises had been suffered to be out of repair, and that the negotiations commenced in *December* had come to an end before the day of the demise in the declaration. The jury found for the plaintiff. In *Easter* term 1835, *Evans* obtained a rule to shew cause why a nonsuit should not be entered (or a new trial be had upon a point which it is not necessary to notice here).

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John Wilson, Chilton, and W. M. James, now shewed cause. No question as to the right of the lessors of the plaintiff to insist on the condition is raised by the evidence, for it does not shew that the Baroness *de Rutzen* came in by descent: she may have come in as devisee. Neither was it shewn that the two sisters were not by different venters. At any rate the payment of rent by the defendant is an admission of the rights of the lessors of the plaintiff, as landlords. But, supposing Lady *Lichfield* and the Baroness *de Rutzen* to be coparceners, the lessors may recover a moiety; *Doe dem. Gill v. Pearson* (a). The condition is apportioned by the descent, being the act of law, according to the principle laid down in *Appowel v. Monnoux* (b), 5 *Vin. Abr.* 300. Condition (G. d) pl. 23., *Dumpar's Case* (c), *Winter's Case* (d), *Anonymous Case in Godbolt* (e), *Sir Richard Lee* and *Arnold's Case* (g). In *Knight's Case* (h) *Ander-son* C. J. of C. P. said, if there be two coparceners of a reversion, and they make partition by writ, the condition remains to each; but that it seems otherwise of partition by agreement. In 3 *Vin. Abr.* 8, *Apportionment* (A) pl. 28. it is said, "Where there are two parceners, and one will take advantage of a forfeiture, and the other not, there must be an apportionment;" for which *Eastcourt v. Weeks* (i) is cited. The case of undivided shares must rest upon the same principle as that in the instance given in *Dumpar's Case* (c), of a man seised of two acres, one in fee and the other in borough English, who leases both with condition, and

(a) 6 *East*, 173.(b) *Moore*, 98. pl. 241.(c) 4 *Rep.* 120 b.(d) 3 *Dyer*, 309 a. pl. 75.

(e) Pl. 3. p. 3.

(g) 4 *Leon*, 27.(h) *Moore*, 205, 6. pl. 349.(i) 1 *Salk.* 186.

dies leaving two sons: there it is said that the condition must be apportioned.

Next, as to the supposed waiver of the right of entry. The notice does not specify the nature of the defects: the landlord, therefore, could not, by the terms of the proviso, repair them himself, and charge the tenant with the expense. And, besides, the proviso gives only an additional remedy, quite independent of the re-entry clause. That it is so appears from *Wood v. Day* (a), and *Roe dem. Goathly v. Paine* (b). *Doe dem. Morecraft v. Meux* (c) will be cited on the other side. There a lease contained two covenants, one to repair generally, the other to repair in three months after notice, with a power of re-entry for non-performance of all covenants: the landlord gave a notice to repair within three months; and the Court held that ejectment could not be maintained till the three months had expired. But there *Bayley J.* said that the landlord had an option to proceed on either covenant, and had elected to proceed on the covenant to repair in three months after notice. The objection was to the proceeding for the forfeiture before the three months had expired. In the present case, the time mentioned in the notice had expired before the day of the demise. And, even if the notice be a waiver of the general covenant, there had been a subsequent breach of the general covenant, between the time at which the notice expired, and the day of the demise; for the premises continued out of repair during that interval, and such continuance is a breach. Thus in *Doe dem. Flower v. Peck* (d) there was a covenant to keep premises insured, with a proviso for re-

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(a) 7 Taunt. 646.

(b) 2 Campb. 520.

(c) 4 B. & C. 606.

(d) 1 B. & Ad. 428.

entry

1886.

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entry in case of breach; and the landlord distrained, during a time at which the premises were uninsured: and it was held that, though the distress was a waiver of the forfeiture up to the time of the distress, yet the landlord might enter by reason of the premises remaining uninsured afterwards. That case is stronger than the present; for there arose in it some questions as to the extent of the covenant to insure: but no question can be raised as to the meaning of a covenant to keep in repair. It cannot be contended that the tenant was absolutely released for ever from the condition of forfeiture, as to all future omissions to repair. It has been sometimes said that claims of forfeiture are to be construed strictly; but Lord *Tenterden*, in *Doe dem. Davis v. Elsam* (a), laid down a sounder rule, that "the provisoes" (in a lease) "ought to be construed according to fair and obvious construction, without favour to either side."

Evans, and *E. V. Williams*, contra. First, as to the right of the one coparcener to sue. Payment of rent to one coparcener enures to both. It may be conceded that the assignee of the reversion in a part of the premises might recover alone in covenant, on a covenant to repair made with the original reversioner, as was held in *Twynnam v. Pickard* (b): the question is, here, whether one of two coparceners entitled to a reversion in the whole can enter alone for a condition broken; which is altogether different. The authorities cited on the other side shew that the condition is not put an end to by the descent; and the defendant does not contend that is. But the one coparcener cannot enter

(a) *M. & M.* 191.(b) 2 *B. & Ald.* 105.

alone.

alone. She cannot be tenant in common with the party against whom she has recovered for condition broken. This is quite distinguishable from the instance put in *Dumpor's Case* (a), where each of the two sons would be entitled to avail himself of the condition, as to his own acre, independently of his brother, neither having any interest in the other's acre. Here each coparcener is interested in an undivided moiety of the whole, and both must join, as in avowry for rent arrere; *Stedman v. Bates* (b). In *Thomas and Fraser's* edition of *Coke's Reports* there is an extract from the MS. notes of Mr. Serjeant *Hill* upon the passage cited on the other side from *Dumpor's Case* (c); and there the distinction is expressly taken between the case of distinct moieties put in *Dumpor's Case*, and that of a descent to coparceners at common law, both as to a distress, and as to a breach of condition. Secondly, as to the waiver of the general proviso. *Doe dem. Morecraft v. Meux* (d) is decisive for the defendant. If the action had been brought before the time mentioned in the second notice had expired, it must have been barred by the notice, on the authority of that case. Then there was nothing to revive the right after that time expired. It was attempted, in *Doe dem. Morecraft v. Meux* (d), as here, to shew that the provisos were independent; but it was held that, by acting on the particular proviso, the landlord affirmed the continuance of the relation of landlord and tenant, and therefore waived the general proviso of forfeiture. [*Patteson J.* Your defence must rest upon the nature of the penalty in the particular proviso that the landlord would do the

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(a) 4 Rep. 120 b.

(b) 1 Salk. 390.

(c) 4 Rep. 120 b. note (D).

(d) 4 B. & C. 606.

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repairs if the plaintiff did not. The forfeiture on the general proviso had accrued before the notice; and that would not be waived, but only suspended, by a notice insisting upon a forfeiture under the particular proviso; *Doe dem. Rankin v. Brindley (a).*] In the present case, it was not a forfeiture which was insisted upon by the notice under the particular proviso, but a right to distrain, which disaffirms the forfeiture. The notice given afterwards, that the covenants would be insisted upon if the agreement were not signed in three days, could not have the effect of reviving the old right, inasmuch as the tenant, after the expiration of the interval during which he was not bound to repair, could not be replaced in his original situation. He must be materially prejudiced by the length of time during which the premises were held subject to the notice under the particular proviso, and therefore repairable, not by him, but by the landlord.

Lord DENMAN C. J. The lessors of the plaintiff are to shew, in the first place, that they represent the person who made the lease to the party represented by the defendant. Supposing the Baroness *de Rutzen* and her sister to be coparceners, there is no authority cited which shews that a single coparcener may recover in ejectment for breach of a condition. But it is unnecessary to enter into that question: I content myself with saying that no authority has been cited to support the proposition. The lessors of the plaintiff claim a right of entry for breach of condition by non-repair of the premises. The non-repair was proved; but the original lessor had reserved to himself a particular remedy, in

(a) 4 B. & Ad. 84.

case of non-repair, by the proviso in the lease which enabled him to perform the repairs himself, and distrain upon the lessee for the amount expended, as so much additional rent. If the reversioner takes upon himself to repair, under a proviso like this, he waives the forfeiture for breach of condition; and this the lessors of the plaintiff have clearly done. They tell the tenant that, in the event of his not repairing, they will themselves repair, and charge him with the expense; and that, in case of further breach, the existence of the lease will be affected. The two months allowed in the lease for the performance of repairs by the tenant expire. No advantage is taken of this; but a second notice is given, which extends the term within which the defendant may perform the repairs, and tells him that, in default of his so performing them, the lessors of the plaintiff will perform them, and charge him with the expense. They put him, therefore, in this situation; that, after the expiration of the time, he will not be justified in repairing. In the mean time, the state of the premises may be growing worse and worse. The defendant has been put out of condition to perform the repairs, the lessors of the plaintiff having told him that, if he did not perform them by a certain time, they would. It does not even appear that he was afterwards told that they called on him to perform them; except that he is informed that, if he does not agree to certain terms in three days, he will be held to his covenant: and that is not a reasonable notice, such as could revive the right already waived. I am, therefore, of opinion that the lessors of the plaintiff, by giving the notice of *November 1830*, took into their own hands a remedy inconsistent with a right to insist on a forfeiture; and that

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there

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there has, consequently, not been any breach of the condition entitling them to recover in ejectment.

LITTLEDALE J. I am entirely of the same opinion. The lease contains, first, a covenant to repair generally; secondly, a power for the reversioner, in case of non-repair, to give notice to repair, and, in case that should not be done for two months, to perform it himself, and distrain upon the tenant for the expense. By giving notice under this latter proviso, the lessors of the plaintiff have waived their right of proceeding under the general power. At the expiration of the notice, they might have entered for the purpose of repairing, and, under that right of entry, might have justified in an action of trespass, and might have charged the tenant with whatever they expended. Having placed themselves in the situation to do all this at any time after the expiration of the notice, they have waived the other right; and, under the proviso to which they have resorted, they have no right of entry, except to repair and distrain for the expense. They cannot enter as for a condition broken. With respect to the other question, I need not enter into it; but I feel very great doubt whether this point also be not against the plaintiff, on the assumption that the Baroness *de Rutzen* is a co-heiress with her sister. It is true that a condition may be apportioned in some cases, as is laid down in *Dumpor's Case* (a), and in *Co. Lit.* 215 a.; where the seventh resolution agrees with the position in *Dumpor's Case* (a); "By act in law a condition may be apportioned in the case of a common person; as if a lease for years

(a) 4 Rep. 120 b.

be made of two acres, one of the nature of *Borough English*, the other at the common law, and the lessor having issue two sons, dieth, each of them shall enter for the condition broken." There seems to be a very good reason for this; for each has an entire estate in the whole. But as to coparceners I doubt. They may join in bringing ejectment: and it seems odd that one alone should be entitled to recover in ejectment for condition broken. But on this I give no positive opinion.

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PATTESON J. I entirely agree, on the point of waiver. *Roe dem. Goatly v. Paine* (a) is the only case which has been cited, tending to shew that such provisoes as these are independent, so that ejectment may be maintained on one, though recourse has been had to the other. But there the notice required the party to repair "forthwith;" a circumstance which was relied upon in the comments made upon the case in the judgment of *Bayley J.* in *Doe dem. Morecraft v. Meux* (b). Certainly he does not say that the party, by proceeding on the special proviso, waives his right to proceed on the general one. But *Holroyd J.* does say so. In the case to which I alluded in the course of the argument, *Doe dem. Rankin v. Brindley* (c), the facts were these. There was a general covenant to repair, but no specific power of re-entry for the breach of that covenant: then there was a proviso for re-entry in case of non-repair within three months after notice, or in case of breach of the other covenants. Notice was given to repair within three months; and ejectment was brought before the expiration of the three months. On the trial,

(a) 2 *Campb.* 520.(b) 4 *B. & C.* 609.(c) 4 *B. & Ad.* 84.

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by consent of parties, an order of Court was made that a juror should be withdrawn, and the repairs be performed on or before the 24th of *June*. Afterwards rent accrued, which the landlord accepted: this was before the 24th of *June*; so that the forfeiture which was afterwards incurred by not repairing on or before the 24th of *June*, was not waived. The repairs not being performed on that day, ejectment was brought; and the plaintiff had a verdict; and this Court refused a rule for a new trial. It was held that the right of re-entry was, at all events, only suspended. *Parke J.* said that the lessor of the plaintiff had put an end to the first action by consenting to the order of Court. "It was the same as if the parties after the 6th of *January* (a), and before the expiration of the three months, had made an agreement between themselves, that the time for repairing should be extended to the 24th of *June*: it was merely a consent to postpone the time of completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time." Here the circumstances are otherwise; for the time is not enlarged for the benefit of the defendant. The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, *or*, if you do not repair within the two months, to perform the repairs myself, and, on so doing, to distrain, not to re-enter. The tenant thus has the option given him, and exercises it by not repairing. The relation of landlord and tenant is so far from being put an end to by this transaction, that it is

(a) The date of the original notice to repair.

affirmed,

affirmed, the tenant being placed in a situation different from that in which he would have been if the general proviso had been insisted upon. On the other point I say nothing.

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WILLIAMS J. The landlord was, after the notice, not entitled to take advantage of the general proviso. He had two remedies, which, to a certain degree, were inconsistent. He was to choose which he would have recourse to: he has chosen to insist upon one, and therefore it is not competent to him to insist on the other, the re-entry as for a forfeiture.

Rule absolute.

DOE on the several Demises of **WILLIAM JONES** and **WILLIAM DAVIES** against **GEORGE WILLIAMS** and **RICHARD HERBERT**.

Thursday,
June 2d.

EJECTMENT for messuages and lands in *Cardigan-shire*. The declaration was of *Hilary* term 4 *W. 4.* (1834). On the trial before *Williams J.*, at the *Cardigan* Spring assizes, 1835, it appeared that *William Davies*, the lessor of the plaintiff, was heir-at-law to one *John Williams*; and that, by indenture of release dated 2d *May* 1765, the premises were mortgaged by the then owner to, and to the use of, *John Williams* in fee, in consideration of 200*L.* advanced by *John Williams*, and subject to a proviso of cesser upon payment of the

D. mortgaged land in fee to *J.*, subject to a proviso of cesser upon payment of the money secured upon a day more than twenty years before the passing of stat. 3 & 4 *W. 4.* c. 27. Within twenty years before the passing of the statute, *D.* acknowledged

that the mortgage money was unpaid. On ejectment brought by the heir of *J.* within five years after the passing of the statute, the jury found that the mortgage money was unpaid. Held, that the ejectment was not barred by sect. 2., *D.*'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plaintiff having, by sect. 15., five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest.

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200*l.*, with interest &c., on the 1st of *March* 1786. Evidence was given for the plaintiff that, in *May* 1814, the defendant *George Williams*, who was then in possession of the rents and profits, had offered to give a bond to *William Davies* for the money secured on the estate, which had not been accepted. Evidence was also given on the part of the defendants to shew that the money had been paid, and the estate reconveyed. The learned Judge directed the jury to find for the plaintiff, unless they were satisfied that the money had been repaid, and a reconveyance had taken place. The jury found for the plaintiff; and his Lordship gave the defendants leave to move to enter a nonsuit, on the ground that the plaintiff was barred, under stat. 3 & 4 *W. 4. c. 27. ss. 2, 3. (a)*, neither he nor his ancestor having been proved to have been in possession or receipt of the profits within twenty years, and no acknowledgment of the title in writing having been shewn, according to sect. 14., and the mortgagee's right having accrued, at latest, on the default of payment (*March* 1786), which was more than twenty years from the commencement of the action. In *Easter* term 1835, *John Wilson* obtained a rule accordingly.

Evans and *E. V. Williams* now shewed cause. It is admitted that the plaintiff is barred, under the 2d and 3d sections of stat. 3 & 4 *W. 4. c. 27.*, unless he is brought within the protection of other clauses of the statute; and he cannot, under the 14th section, avail himself of any acknowledgment of title not in writing. But the question is, whether there was any adverse

(a) Stat. 3 & 4 *W. 4. c. 27.* received the Royal Assent 24th July 1833.

possession against the lessors of the plaintiff at the time of passing the act (24th July 1833); for, if there was not, they have, by the 15th section (a), a right of re-entry for five years from that time; and this ejectment was brought within the five years. The question of adverse possession must be determined by the law as it stood before the act passed. Now in *Hall v. Doe dem. Surtees* (b) it was held that the fact of the principal being unpaid by the mortgagor to the mortgagee, on the day appointed for payment of the principal, prevented the possession of the mortgagor from being adverse to that of the mortgagee, though no interest was found to have been paid, and though twenty years had elapsed since the day appointed for payment. Here the offer to give the bond shewed that the principal was unsatisfied even at a date within twenty years of the time of the passing of the act; there was therefore no adverse possession at that time. The mortgagor, at the time of the act passing, was bailiff to the mortgagee.

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John Wilson and *Chilton* contra. This is an attempt to evade the provisions of the statute. The mortgagor's title accrued in *May* 1765, or at any rate in *March* 1786; and no possession, or receipt of the profits, or

(a) Stat. 3 & 4 W. 4. c. 27. s. 15. enacts, "that when no such acknowledgment as aforesaid" (acknowledgment of title, in writing, according to sect. 14.) "shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act."

(b) 5 B. & Ald. 687.

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written acknowledgment, has ever taken place. The possession, at the time of passing the act, was therefore adverse. Even if the parol acknowledgment in 1814 can be set up, there was an adverse possession in *July* 1833, though not one of twenty years, and that is sufficient to render the 15th section inapplicable; for that section speaks, not of a possession sufficient to bar an entry, but of a possession adverse at the time of the act passing. The effect of the 40th section (a) would be also evaded, if this action were not barred; for by this ejectment the money might be recovered indirectly. That section must have contemplated the action of ejectment on mortgage; for this is the only way in which money can be recovered on the mortgage itself, that giving no right of action for the money, though the deed generally contains, besides the mortgage, a distinct covenant to pay. In *James v. Salter* (b) a devisee of an annuity charged by the devise upon land, who had never received any of the annuity, twenty years having elapsed from the devisor's death, was held not to be barred; but it is clear, from the judgment of *Tindal C. J.*, that, if the

(a) Sect. 40. enacts that, after 31st *December* 1833, "no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

(b) 2 *New Ca.* 505.

third

third section had not excepted the case of a will, the statute would have been held a bar. That case is, therefore, an authority in the defendant's favour. [*Patteson J.* Do you say that the possession was adverse as soon as twenty years had elapsed from the right accruing? Suppose interest had been paid on the mortgage regularly, the plaintiff, according to that construction, would nevertheless be barred.] The statute excepts the case of a written acknowledgment; and the payment of interest is tantamount. [*Patteson J.* If the legislature meant to except the case of payment of interest, it is very odd that they did not do so in express terms.]

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LORD DENMAN C. J. It is contended that the plaintiff is barred by the second and third sections of the act. (His Lordship here read the second and third sections.) The fourteenth section provides that, if a written acknowledgment be given, the right shall be deemed to have first accrued from the time at which it is given. (His Lordship then read the fourteenth section.) Here no written acknowledgment was proved. But then the plaintiff is said to be protected by the fifteenth section. (His Lordship then read the fifteenth section.) Under this clause, the necessity of a written acknowledgment does not arise, if there be no adverse possession at the time of the act passing, and the action be brought in five years from that time. But then it is said, on behalf of the defendants, that there was an adverse possession at the time of the act, twenty years having elapsed without payment of interest. It seems to me that that is not so. The possession of the mortgagor is consistent with the right of the mortgagee; and,

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and, therefore, the possession is not adverse at any assignable period, unless the jury, from renunciation by the mortgagor, or some other circumstances, are induced to find the fact of adverse possession. That argument, therefore, fails; and then there was no necessity to prove a written acknowledgment, and the statute does not bar the plaintiff.

LITLEDALE J. I think the act does not prevent the plaintiff from recovering. The question as to the fact of an adverse possession, such as would bring a party within the fifteenth section, must be determined as it would have been if the act had never passed. The conversation in *May* 1814 was an acknowledgment amounting to a distinct recognition of the right of the mortgagee. The possession of the mortgagor therefore could not be adverse. If, at the time of the act passing, twenty years had not elapsed from a payment of interest, or the making of an acknowledgment, there could not be an adverse possession at that time. That being so, the plaintiff had five years to bring the ejectment. The fortieth section is not applicable: for this action is to recover the land, whereas the fortieth section relates to actions brought to recover the money, and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it.

PATTESON J. From the language of the fifteenth section it plainly appears that something or other was, after the act passed, to be considered as adverse possession, which was not so before the act passed. For, in that section, it seems to be considered that the possession,

session, which, up to the passing the act, was not adverse as the law then stood, would, by the operation of the act, become so on the very day after the act passed; and that by relation; otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up. What is adverse possession at the time of the act passing, in the sense of that section, depends therefore upon the law as it stood up to that time. One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge v. Bere* (a) such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and in a late case (b) Lord *Tenterden* said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee; and, therefore, I think that the fifteenth section applies to the present case. How far, under the third section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all (c). If the third section was intended to comprehend the case of a mortgagee, it is very ill penned; and the fortieth section, if meant to apply to actions of ejectment, is still worse penned.

WILLIAMS J. concurred.

Rule discharged.

(a) 5 B. & Ald. 604.; and see note at the end of the case. Also note in *Morley and Coote's* (7th) edition of *Watkins on Conveyancing*, p. 18.

(b) Perhaps *Doe dem. Roby v. Maisey*, 8 B. & C. 767.

(c) Stat. 7 W. 4. & 1 V. c. 28. regulates the time at which entry may be made or action brought by a mortgagee of land within the definition of stat. 3 & 4 W. 4. c. 27. s. 1., giving twenty years from the last payment of any part of the principal or interest, though the right of entry may have first accrued more than twenty years back.

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Thursday,
June 2d.

THOMAS DAVID EUBANKE *against* OWEN.

A married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single.

Having paid rent to *A.*, of whom she took the premises, under a threat of distress, she was distrained upon by *B.*, claiming to be the landlord, for the same rent. She brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A Judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his plea and avow, in which case the plaintiff's coverture should not be set up:

Held, that such an order could not be made without the defendant's consent, though in a case of obvious oppression. Order set aside.

ELIZABETH EUBANKE, the wife of the plaintiff, occupied part of a house in *Finsbury Square*, under an agreement made between her and *James Haldon* in April 1835. Her husband, the plaintiff, had resided abroad several years, and continued abroad when this case was decided. In August 1835, *Robert Franks* entered into an agreement with *Haldon* for the purchase of his interest in the premises, and was let into possession. He paid part of the consideration-money agreed upon, but not the residue, alleging that he had been deceived as to the extent of premises of which he was to be put into possession, and the terms of Mrs. *Eubanke's* under-tenancy. On December 26th 1835, Mrs. *Eubanke* paid to the solicitors of Messrs. *Fosket*, the superior landlords, a part of the quarter's rent due at Christmas, having been some time before threatened by them with a distress unless she so paid it; and, on January 4th, she paid the balance of the same quarter's rent to *Haldon* under a like threat, he alleging that *Franks* was not entitled to receive it, as he had not paid *Haldon* the consideration-money for the assignment of his interest, and that such assignment had not in fact taken place. On January 6th 1836, a person demanded the same quarter's rent of her on behalf of *Franks*, to which demand she answered that she had already paid it to Messrs. *Fosket's* solicitors and *Haldon*; and she produced the receipts. On the same day a

distress

distress was made of her goods on behalf of *Franks* for the quarter's rent, although Mrs. *Eubanke*, on that occasion also, produced the above-mentioned receipts. The notice of distress was addressed to her. She afterwards commenced an action of replevin against the bailiff, *Owen*, and delivered a declaration, in her own name, as sole plaintiff. The defendant pleaded, first, the plaintiff's coverture at the time of the distress; secondly, that the property in the goods seized was vested in her husband and not in her. In the last *Easter* vacation, a summons was taken out to shew cause before *Patteson J.* why the proceedings should not be amended by inserting the name of *T. D. Eubanke*, the husband, in the declaration. At the hearing upon the summons, the principal facts above mentioned were submitted to the learned Judge; and Mr. *Franks* deposed that, at the time of his entering into treaty for the premises, *Haldon* had represented Mrs. *Eubanke* to him as a widow; and that she herself had made a similar representation; which she, in her affidavit made on applying for the summons, denied. He also stated that he had, on *December 26th*, before she paid her rent to the superior landlord, requested her to pay it to himself, which she had refused. *Patteson J.* made the following order:—“That the proceedings on the part of the plaintiff be amended by inserting the name *Thomas David Eubanke* in the declaration, without costs, unless the defendant consent within two days to withdraw his pleas and avow, in which case the plaintiff shall not set up her coverture in this action, or in any action on the replevin bond, nor shall her sureties do so.” The name was accordingly inserted. In *Easter term 1836*, a rule nisi was obtained on behalf of the defendant for setting aside the order.

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Crowder in the same term shewed cause (a). The order is equitable; and the Courts have often interfered in similar ways. [*Coleridge J.* Is there any instance in which a new party has been introduced as plaintiff in the manner proposed?] There is no direct authority; but the Courts will prevent a party from availing himself of a legal right, where a gross injustice would be the result. In *Legh v. Legh* (b), where an action was brought against the obligor of a bond, by a party to whom it had been assigned with notice to the obligor, and the assignor received the money of the obligor, and gave a release pending the action, the Court of Common Pleas held that a plea of such release might be set aside. The party employing the bailiff here has taken Mrs. *Eubank's* goods for rent claimed of her as his tenant, and now it is denied that they are hers. [*Littledale J.* He might distrain any goods on the premises.] No case has been found exactly like the present. *Innell v. Newman* (b) has the strongest bearing against the defence set up.

Platt contra. The party employing the bailiff found the plaintiff in possession; and she, when the rent was due, paid a rival claimant. His only remedy was to distrain. On her bringing replevin, no avowry or cognizance could be made as on a demise to her, because it was then discovered that she was a married woman; the only course was to plead her coverture. [Lord *Denman C. J.* Could she have pleaded her coverture in bar after bringing this action? *Coleridge J.* The order is that she shall not set up the coverture.

(a) May 8th. Before Lord *Denman C. J.*, *Littledale*, *Patteson*, and *Coleridge Js.*

(b) 1 B. & P. 447.

(c) 4 B. & Ald. 419.

Patteson J. You say that there was no demise to her; if so, why should not *Franks* bring ejectment to try the real question, which is, whether he or *Haldon* is the landlord. *Mrs. Eubanke* has nothing to do with that question.] She has no power of binding herself not to set up her coverture. And the Court cannot put the name of a plaintiff on the record without his authority.

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Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. The plaintiff in this case was a married woman, whose husband had left the country. She entered upon premises under an agreement with *Haldon*, who afterwards sold his interest to *Franks*. At *Christmas* 1835, both claimed the quarter's rent then coming due. *Haldon* had not told *Franks* that *Mrs. Eubanke* was a married woman; but she denies that she had ever told *Franks* the contrary. She paid the quarter's rent to the superior landlord, and to *Haldon*, upon which *Franks* distrained her goods: she proceeded in replevin, and the pleas now in question were pleaded. Then *Franks* says that there would have been a difficulty in avowing or making cognizance on a demise by him to *Mrs. Eubanke*, because she was a married woman. The case was much discussed before my brother *Patteson*; and he wished to put it into such a form that the right of *Franks* to distrain might have been tried. *Mrs. Eubanke* was willing that this should be done, but it was refused on the other side; and under these circumstances the order was made, which we are now called upon to discharge. This is obviously a case of great oppression; and we should

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be glad to give relief in it if we had the power; but we see no legal ground upon which we can interfere in the manner pointed out by the order: and it must therefore be set aside, but without costs.

Rule absolute accordingly.

Thursday,
June 2d.

Sir ROBERT CLAYTON, Bart. *against* GREGSON.

Lessees of a coal mine covenanted with the lessors that they would, by a certain time, get all the demised coal in the township of B. "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. In an action for breach of the covenant, a question arose whether "level" was used in the ordinary sense, of a horizontal plane, or in a peculiar

sense, having reference to the drainage: Held, that evidence was admissible to shew the understanding of the term "level," used as in the above lease, among coal-miners.

It was referred to an arbitrator to receive evidence as to the meaning of the covenant, according to the *custom and understanding of miners*, and to state a case for the opinion of the Court. He found that the mine was situate within an extensive coal-mining district in the county of Lancaster; and that, "according to the custom and understanding of miners throughout that district," the terms "level," "deeper than," and "below," signified &c.; stating the construction of the terms, which was in favour of the defendant. It did not appear, as to some of the parties to the lease, that they resided within the district, and they were named, in the lease, as of other places.

Held, that the existence of the custom stated, in the district wherein the mine lay, did not raise a conclusion of law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion; and that the Court could not give judgment for the defendant.

Semble, that they might have done so, if the arbitrator had found the custom of miners without limitation as to a district.

indorsed

indorsed with the letter *A.*) of the close in *Blackrod* aforesaid, called the *Nearer Old Field*, in the possession" &c., "and which point or part of the said close is 300 yards from the centre of the *Lancaster* canal aqueduct over the river *Douglas*, measuring the said 300 yards on the surface of the land, from the centre of the said aqueduct, in a straight line to" &c. And that the lessees should pay, at certain rates per acre (of the measure of eight yards to the rod), for all parts of the mines to be gotten under this covenant, for which no rent should have become payable under the previous reservations, whether such parts should be gotten or not. Breach (5th,) that the lessees did not get, before *December* 30th 1832, the whole of the demised mines, &c., under the said messuages, &c., situate in *Blackrod*, not deeper than or *below the level* of the bottom of the *Arley* mine under the said part, &c.; and, on the said 30th of *December*, divers parts of the said mines, to wit &c., lying not deeper &c., remained ungotten, and for which no rent had become payable under the previous reservations; and thereupon a large sum, to wit &c., according to the above rates per acre, became due to plaintiff, and was in arrear. Plea: That the lessees did, before *December* 30th 1832, get the whole of the demised mines, &c., in the indenture mentioned to be situate, &c., not deeper than or *below the level* &c. Conclusion to the country, and issue thereon. There was another plea as to this breach, which it is unnecessary to state. The declaration also alleged the breach of a covenant by the lessees to work the demised mines, &c., fairly and orderly, and in a regular and workmanlike manner, and to get and raise all and every the said demised mines fully and clearly before them, and not

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get and work any one or more of them and leave the other or others of them ungotten, but that they should and would, as they should get any one of the said demised mines, get the others and other of them. Issue was joined on this breach.

On the trial before *Alderson J.* at the *Lancaster Spring Assizes*, 1834, it became a question, as to the first-mentioned breach of covenant, what portion of the coal in *Blackrod* the lessee was bound to get, as lying "not deeper than or below the level" of the bottom of the *Arley* mine under the point *A*. For the plaintiff it was contended that the word "level" must have its ordinary sense. The defendant's counsel maintained that, in this contract, the word "level," according to the custom and understanding of miners, had reference to the drainage; and that every part of the mine which would require to be drained from a point lower than the bottom of the mine under *A*. was below the *level* of the bottom there, though it might be above the horizontal plane passing through such part of the bottom. They offered evidence to prove this understanding; but the learned Judge refused to admit it, there being no reference to such custom and understanding in the deed. The value of the coal ungotten, according to the plaintiff's construction, was 22,000*l.*; according to the defendant's, 5000*l.* A verdict was taken for the plaintiff on the first-mentioned breach of covenant, for 22,000*l.*, subject to be reduced to 5000*l.*, if the Court should ultimately be of opinion that the evidence offered was receivable, and that its effect was that contended for by the defendant. And it was agreed that the 5000*l.* should be paid immediately, and costs up to that time; and that the evidence, if held admissible, should be referred to an arbitrator,

on

on whose report the Court should determine the case, or order a new trial.

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F. Pollock, in *Easter* term 1834, obtained a rule nisi for a reduction of damages or a new trial. In moving, he cited *Smith v. Wilson* (a).

Coltman and *Cowling*, in *Easter* term 1835, shewed cause. The evidence offered was not admissible; and the word "level" must be understood in its usual sense. It means the line at which water would stand. The principle on which explanatory evidence is admitted in the case of mercantile contracts (and the rules as to these bear, by analogy, on the present case) is stated by Lord *Hardwicke*, in *Baker v. Paine* (b), to be, that "they have a style peculiar to themselves, which is short, yet is understood by them; and must be the rule of construction." And in *Blunt v. Cumyngs* (c) he says of mercantile contracts, that, "where a doubt arises about them, the usage and understanding of merchants is read thereto." But the admission of such evidence has been watched with great jealousy; and Lord *Eldon*, in *Anderson v. Pitcher* (d), said that it was perhaps to be lamented (in the case of policies of insurance) that it should have been introduced at all. In *Cross v. Eglin* (e), where evidence was offered as to the meaning of "more or less" in a contract for grain, *Littledale J.* said, "With respect to the evidence, I think there is considerable doubt whether it was admissible: it is true such evidence is often received to

(a) 3 B. & Ad. 728.

(b) 1 Ves. sen. 459.

(c) 2 Ves. sen. 331.

(d) 2 B. & P. 168.

(e) 2 B. & Ad. 106.

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explain mercantile terms; but "about," and "more or less," seem to be words of general import, and I should have much difficulty in saying that evidence ought to be received to ascertain their meaning." In *The Attorney-General v. The Cast Plate Glass Company (a)*, the Court of Exchequer held that evidence was not admissible to shew what the legislature meant, in stat. 27 G. 3. c. 28., by the "squaring" of glass. *Smith v. Wilson (b)* was the case of a word denoting number; and it is well known that words of number are often used arbitrarily in trade, as in the instance of "a hundred weight." There could be no doubt in *Smith v. Wilson (b)* that, if the word "thousand" had a particular sense, it was used in that sense. Where parol evidence is admitted to explain written documents, it is only on the ground of necessity; per Gibbs C. J. (as to wills) in *Doe dem. Oxenden v. Chichester (c)*. Mercantile writings are not to be so explained, unless the Court can see, from the nature of the terms used, that there is something in them which requires such elucidation. In 2 *Starkie on Evidence* 566 (*d*) it is said, as to the interpretation of such writings by extrinsic evidence, that if merchants "use plain and ordinary terms and expressions, to which a natural unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principles so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary." *Mitchell v. Baring (e)* confirms this view of the subject. And so, in the present case, if

(a) 1 *Anstr.* 39.(c) 4 *Dow.* 93.(e) 10 *B. & C.* 4.(b) 3 *B. & Ad.* 728.

(d) 2d edit.

the Court see that the words in question are plain and common ones, not obviously having reference to the usages of mining, such as "deeper," "below," and "level," they will not allow a recourse to explanatory evidence. [Lord Denman C. J. Some cases in Mr. *Starkie's Appendix (a)* are against you. *Littledale J.* Surely "level" has a technical sense in mining; and, in other instances, it is not strictly confined to the signification of a horizontal surface; as, for instance, when a tract of country is called a "level." *Coleridge J.* Every level in a mine is not horizontal. The adit level drains itself.] Assuming that the word "level," here, does not of itself suggest a necessity for explanation, there is nothing in the context of the deed of demise, or in the circumstances of the case, to raise an ambiguity. None can arise from the covenant to work the mines fairly and orderly, and without improper preference; that clause is consistent with the words in question if interpreted in the plaintiff's sense, and not otherwise. (Some arguments which followed, on the terms of the deed and facts of the case, are omitted, the decision not having turned on these points.) If it had been intended to speak of a "level" in the defendant's sense, the parties would probably have used the expression "water level," which does occur in another part of the deed (*b*). So, where an acre different from the statute acre is spoken of, the deed expressly states the measure to be eight yards to the rod.

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(a) See 2 *Starkie on Evidence, Appendix*, p. 1076. 2d edit.

(b) There was a covenant that the lessees would, at the end of the term, leave open and in good order "all the drifts, hollows, water levels, and ranges," which should, during the term, have been made in the demised mines.

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Sir *F. Pollock*, with whom were *Wightman* and *Joseph Addison*, contra, was stopped by the Court.

LORD DENMAN C. J. We are all of opinion that the evidence was receivable. The learned Judge who tried the cause does not seem to have had a strong opinion on the subject, but only to have put the question into the most convenient course for ultimate decision. The word "level" is not in itself a technical word; but it is used in a particular business in such a manner that it may, consistently with its general meaning, have a particular meaning also. It is a term which, in its general use, may have more than one meaning, and, as it is employed here, it clearly has a technical sense, and may properly be explained by evidence.

LITLEDALE J. I am of the same opinion. The word is like many others in the *English* language, which may have several meanings.

PATTESON J. The word "level" must be taken secundum subjectam materiam. Here, it is a term used in mining, and, as such a term, requires explanation.

COLERIDGE J. concurred.

The following order was made by consent. That the rule should be enlarged till the tenth day of the next term, and that in the mean time it should be referred to a barrister (who was to be furnished with the notes of *Alderson J.*), "to receive evidence of the meaning of the covenant on which the fifth breach was assigned, according to the custom and understanding of miners,

miners, and to state a case for the opinion of the Court, to be turned into a special verdict if desired by either party."

The arbitrator made an award, or certificate, commencing as follows: — "By virtue of a rule" &c., "I, the arbitrator," &c., "having received evidence of the meaning of the covenant on which the fifth breach in the declaration in the said cause is assigned, according to the custom and understanding of miners, find and state as the effect of such evidence, that the coal mines mentioned in the pleadings are situate within an extensive coal mining district in the county of *Lancaster*. That, according to the custom and understanding of miners throughout that district, a coal level or water level is" &c.: the arbitrator then stated what such level was, and what was "the level of the bottom of a mine," under a given point. In subsequent parts of the award he stated "that, according to the custom and understanding throughout that district, the terms 'deeper than' and 'below' do not depend upon relative perpendicular depth below the surface, but upon the inclination of the strata, and power of drainage;" and "that, according to such custom and understanding throughout the said district, the covenant on which the said fifth breach is assigned is to be thus construed and understood, and the coals not deeper than or below the level of the bottom of the *Arley* mine are to be thus ascertained and determined;" and the mode was then explained. In the ensuing *Michaelmas* term (*November 16th, 1835*),

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Sir *John Campbell*, Attorney-General, *Coltman* and *Cowling* stated to the Court that the arbitrator had

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made his adjudication as above stated; and they contended that no special case could be framed upon it, but that the rule for a new trial must be made absolute. It was referred to the arbitrator to find the meaning of the covenant, "according to the custom and understanding of miners;" but he has found it only according to the custom and understanding of miners throughout "an extensive coal-mining district in the county of *Lancaster*." The award is not according to the power given. If there had been a general custom found, it might be presumed that the parties to this demise had chosen their expressions with reference to it. Here it is not even found that the lessors or lessees resided in the district mentioned; and the indenture itself shews the contrary (a). No case has established that a contract relating to premises may be explained with reference merely to the custom of the country in which the premises lie. In *Smith v. Wilson* (b) the "custom of the country" referred to appears to have been that of the country where the contract was made. [*Coleridge J.* Parties to such a contract may reside in different countries]. And, therefore, it ought to be proved that the understanding is a very general one, before evidence of it is received on a question of this kind. In *Gabay v. Lloyd* (c) the custom and usage among insurers and underwriters in the habit of subscribing policies at

(a) The parties to the demise were, "Sir *Richard Clayton* of *Adlington* in the county of *Lancaster*, Baronet, *Robert Clayton* of *The Larches* within *Wigan* in the said county, Esquire, *William Clayton* of *Wigan* aforesaid, gentleman, and the Rev. *John Clayton*, clerk, rector of the parish and parish church of *Frome Saint Quintin* in the county of *Dorset*, of the one part; and *Richard Worrwick*, banker, and *Samuel Gregson*, merchant, both of *Lancaster* in the said county of *Lancaster*, and *John Wakefield* of *Kirkby Kendal* in the county of *Westmoreland*, banker, of the other part."

(b) 3 B. & Ad. 728.

(c) 3 B. & C. 793.

Lloyd's

Lloyd's coffee-house was relied upon for the defendant as controuling the language of a policy which had been effected there; but the Court held that such usage could not bind the plaintiffs, since it did not appear to be the usage of the whole trade in the city of *London*, and it was not found that the plaintiffs were in the habit of effecting policies at *Lloyd's*, or knew of the usage. [*Patteson J.* It is not clear whether the arbitrator means that the custom is a general one, or that it prevails in the district, and not elsewhere]. The statement is not clear; but it seems to be an affirmative pregnant.

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Sir *F. Pollock*, *contra*. This is an attempt to argue the case prematurely. It is enough, for the present, if the finding of the arbitrator presents something upon which the Court may come to a decision when a case is stated. It was referred to him to receive evidence of the meaning of the covenant, according to the custom and understanding of miners, and to state, not that general custom and understanding, but a case, such as he is enabled to state by the evidence before him. [*Patteson J.* The objection is, that he has not stated the whole result of the evidence.] The result is, that a certain custom prevails within the district referred to; what is the custom beyond it does not appear. A jury in the like case would not be bound to say what understanding did or did not prevail out of the district. The defendant is willing to argue the case upon the present finding.

PATTESON J. (a) We cannot pronounce the finding to be such that a special case cannot be stated and

(a) Lord Denman C. J. was absent.

argued

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argued upon it, and therefore the rule of *Easter term* 1834 must be further enlarged, in order that the case may be stated.

WILLIAMS and COLERIDGE Js. concurred.

Rule enlarged.

The special case was stated accordingly. It set forth the material parts of the pleadings, the proceedings at the trial, the rules of *Easter term* 1834 and *Easter term* 1835, and the finding of the arbitrator; and it stated the question for the opinion of the Court to be whether the damages were to remain 22,000*l.*, or to be reduced to the 5000*l.* paid by the defendant, or a new trial to be had. The special case was now argued.

Sir *J. Campbell*, Attorney-General, for the plaintiff, repeated the objection formerly taken to the finding of the arbitrator, and contended that either the verdict must stand, or a new trial be had (*a*). The Court called upon

Sir *F. Pollock*, *contra*. The plaintiff, on the trial, had not entitled himself to a verdict. It was evident, from the whole contents of the lease, that the word "level," in the covenant in question, could not admit of the plaintiff's construction. (He then discussed the terms of the lease, with reference to this point.) Then

(*a*) *Littledale J.* observed (as shewing that the use of a word in a particular sense throughout one district of *Lancashire* was not conclusive as to its signification in another) that the word "acre" was used, in different parts of that county, as denoting the statute acre, the acre (commonly called the *Cheshire* acre), of eight yards to the rod, and an intermediate acre called the *Lancashire* acre.

evidence

evidence was offered for the defendant to shew that, according to the usage of miners, the words, "below the level" of the bottom of the mine under the point *A*, related merely to the fact of the mine being drained from points above or below the bottom of the mine at the part mentioned. That evidence being rejected, the Court, on motion for a new trial, thought it admissible, and referred it to an arbitrator. If there has been any miscarriage before him, there must at least be a new trial; the verdict cannot stand. The direction to him was, to receive evidence of the meaning of the covenant "according to the custom and understanding of miners." He has found that there is an extensive mining district in which the mines in question are situate, and in which the terms in question have the meaning ascribed to them by the defendant. He was not bound to enquire what would be the understanding of the same terms in distant places, as in *Scotland* or *Ireland*. He was not in the situation of a person acting on a power which must be strictly pursued; he was put in the place of the judge and jury at *Nisi Prius*, and was to shape his enquiry so as to meet the particular view with which the question was submitted to him. It must be taken that he examined those miners whose understanding on the subject would be of importance to the enquiry, and not others. It was not his duty to state that he had no information as to the general usage. [Lord *Denman* C. J. Is not his statement, that the custom is such throughout a particular district, an affirmative pregnant, implying that the custom may be different in other districts, which districts may be near or remote?] In *Smith v. Wilson* (a) the proof was that, according to the custom

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(a) 3 B. & Ad. 728.

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“in that part of the country,” a hundred dozen rabbits went to the thousand. [Lord *Denman* C. J. The jury there had found for the defendant; and it was assumed that they had had evidence upon which their opinion might be formed.] It was sufficient that the custom appeared to prevail in the district where the farm was. So here, if the arbitrator had expressly found that, in various districts of *Lancashire*, adjoining each other, there were various customs, and that in one of them, being that in which the mines in question were, the custom was as it is here stated, the conclusion of law would have been that parties to a lease of land situate there expressed themselves in such lease according to the custom of that district. The only object of the reference to an arbitrator was to fix the meaning of the parties; and it is fixed by the conclusion of law arising from the custom.

Lord DENMAN C. J. (after stating the question submitted in the case). I am most clearly of opinion that the evidence offered at the trial was fit to be received. I also think it clear that it was matter for the jury, on the whole evidence, whether or not the contract was made with reference to the particular custom alleged; and that the mere fact of the existence of such a custom, in the district in which the mines lie, was not sufficient to establish, as a matter of law, that the meaning of the contract was that insisted upon by the defendant. We cannot, under these circumstances, reduce the damages. It is fit that a jury should say what effect the existence of the custom has upon this contract. The result is that there must be a new trial. If the award had followed the words of the order, that the arbitrator should “receive evidence of the meaning of the covenant on which

which the fifth breach was assigned, according to the custom and understanding of miners," I think his adjudication would have been final; but, as he has considered it his duty to modify his finding, a serious doubt remains. It may be that the lessees, or some of them, resided at places out of the district mentioned, and in which different customs prevail, and they may have had no idea of the understanding in this district: it is, therefore, possible (though perhaps not probable) that they did not mean to contract according to the custom proved. We cannot, however, put ourselves into the situation of a jury as to this question.

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LITLEDALE J. The verdict for 22,000*l.* cannot stand, because the evidence rejected at the trial was admissible. Then as to the award. The order of reference did not confine the enquiry to any one part of the country, but directed it to the custom of miners generally, though, no doubt, with an understood application to coal mines. If the arbitrator had followed the words of the order, and found that the word "level" (which is capable of many different meanings) meant, "according to the custom and understanding of miners," so and so, judgment might have been given for the defendant: there would have been a result in law in his favour. But the finding is limited to a particular district; which is as much as to say that the word, which has a particular signification in this district, may mean differently in others: and, if that be so, it cannot follow as an inference of law that in the present contract it was used in the sense pointed out. It ought, therefore, to be shewn as a matter of fact that the parties so used it. Two of the lessees lived at *Lancaster*, and a third at *Kendal*; it might, therefore, be a subject of inquiry whether they

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wife of *Thomas Wallis, Elizabeth Viner*, now the wife of *Daniel Kingscott*, and *Ann Viner* the third daughter, now unmarried, all that freehold or leasehold premises, now rented by *Joseph Beddow* confectioner, situated in *Margaret's Buildings* in the city of *Bath* in the parish of *Walcot*, county of *Somersetshire*" (being the premises in question in this action), "to and for their own use and purposes, equal share and share alike, not the one to have a preference or more than the other. There is a remnant of a lease on the premises, and above fourteen years of which is unexpired. I give and bequeath unto my niece *Ann Viner* daughter of my brother *Charles Viner*, and unto *Charles Viner*, son of my brother *Charles Viner*, and unto *William Viner*, another son of my brother *Charles Viner*, all those two freehold or leasehold premises situate and being No. 9. and 19. on the west side of *Morford Street*, in that part of the parish of *W.* which lies" &c., "to and for their own uses and purposes, share and share alike, not the one to have a preference to the other, or the one to have more than the other: the house numbered 19. is in the occupation of *John Calley* tenant at will; the house numbered 9. is in the occupation of *James Bulgar* tenant at will; the house numbered 19. is subject to a mortgage of 200*l.*; the house numbered 9. is subject to a mortgage of 150*l.*, which making together 350*l.*, which 350*l.* I charge on the whole of my estate in equal portions alike to discharge the said sum of 350*l.*" "My silver pint cup," &c. (then followed some bequests of particular articles). "The remainder of my plate, together with my household furniture, linen, and china, I direct to be equally divided between my four nieces, share alike with each other. The rest and remainder of my property, be what it may, unto my brother

brother *Charles Viner*, for his own use and disposal." Then followed a statement as to some bank stock in which the testator claimed an interest; and he added, "my share and interest in the above bank stock, together with the dividends due thereon, I give and bequeath unto my brother *Charles Viner* for his own use and purpose." And he nominated one *Richard Brook* his executor.

The testator died in 1814, leaving his three nieces above mentioned, and his brother *Charles Viner*, him surviving. *Charles Viner* entered into and enjoyed the premises in *Margaret's Buildings* till 1823, when he died; and thereupon *Fanny*, *Elizabeth*, and *Ann*, the nieces of *William Viner*, entered upon and held the premises. In 1833, *Elizabeth* (then the widow of *Daniel Kingscott*) died, leaving a son, *William Kingscott*, her heir-at-law, and her sisters *Fanny* and *Ann*, her surviving.

On her death, the defendant claimed in her right one third of the last-mentioned premises. The lessors of the plaintiff claimed the same third under a devise by *Charles Viner*, brother of *William*, the first testator, (after *William's* death) of one third part of the reversion in fee, expectant on the decease of *Fanny*, *Elizabeth*, and *Ann*, of and in the premises in *Margaret's Buildings*. The question for the opinion of the Court was, what estate *Elizabeth Kingscott* took under *William Viner's* will. The lessors of the plaintiff contended that she took a life estate only; the defendant that she took an estate in fee.

W. H. Watson, for the plaintiff, was stopped by the Court.

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Sir *W. W. Follett*, contra. The intent is clear; the question is whether the words bear it out. The testator devises "all that *freehold or leasehold* premises" situated in *Margaret's Buildings*. If they had turned out to be leasehold, the words used were clearly such as would have passed the absolute property. [Lord *Denman* C. J. If he was aware of the law in that respect, must not he be supposed to have known what words carry freehold property?] There is no devise over, as to any of the devised parcels. And the expression as to this is, "I give and bequeath unto my three nieces" "all that" &c., "to and for their own use and purposes, equal share and share alike." The case coming nearest to the present is *Loveacres dem. Mudge v. Blight* (a), where similar words to these were held to pass a fee. [*Patteson* J. referred to *Goodright dem. Drewry v. Barron* (b).] The first cited case is commented upon there, but not over-ruled. In *Roe dem. Shell v. Pattison* (c) the testator, after bequests of stock, devised "all the remainder in the above stocks with my freehold property to my sister;" and it was held that a fee passed: there may, however, be a distinction between that case and the present. [Lord *Denman* C. J. Here the words relied upon are used after a devise of the rents and profits of the testator's "estate"].

Per Curiam (d). Judgment for the plaintiff (e).

- (a) 1 *Cowp.* 352. (b) 11 *East*, 220. (c) 16 *East*, 221.
(d) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* J.
(e) See *Doe dem. Norris v. Tucker*, 3 B. & Ad. 473.

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DOE on the Demise of JOHN PERRY *against* *Friday,*
WILSON and Another. *June 3d.*

EJECTMENT for copyhold premises in the manor and parish of *High Roothing*. A case was stated for the opinion of this Court, pursuant to stat. 3 & 4 W. 4. c. 42. s. 25. The material parts of the case were as follows:—

George Wright, being seised in fee of the premises above-mentioned, which by the custom of the manor descended as freehold and were devisable, made his will, dated *November 18th 1819*, and thereby devised as follows:—“ I give, devise, and bequeath all and every my messuages, lands, tenements, hereditaments, and real estates, situate, lying, and being in the parish of *Birchanger*, in the county of *Essex*, with their respective appurtenances, unto my dearly beloved sister *Mary Lincoln*, and to her heirs, executors, administrators, and assigns, absolutely and for ever. Also I give, devise, and bequeath all and every other my messuages, lands, tenements, hereditaments, and real estate, with their respective appurtenances, and also all my ready money and securities for money, debts, rents, and arrears of rent, goods, chattels, effects, and personal estate whatsoever and wheresoever, and of what nature, kind, or quality soever, unto *John Perry*, one of the sons of *Mary Perry* widow,” &c., “ and to the heirs, executors, administrators, and assigns of the said *John Perry* for ever, subject nevertheless ” to debts, funeral expenses, and a legacy.

Devise, by an heir at law, of copyhold descended to him, is good, though he never was admitted or surrendered, or paid the fine due to the lord on the descent of such copyhold.

Stat. 55 G. 3. c. 192., making devises of copyhold valid without surrender to the uses of the will, extended (a) to wills made under the above circumstances.

(a) See stat. 7 W. 4. & 1 V. c. 26., sects. 2, 3, 4.

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George Wright died in *November* 1819, never having been admitted to the copyhold. He had not, at the date of his will, or at the time of his death, any real estate at *Birchanger*, or any real estate at all, except the copyhold premises above-mentioned. In 1823, *Mary Lincoln*, the sister and heiress of *George Wright*, was admitted to the copyhold premises; and *John Perry*, the lessor of the plaintiff, was subsequently admitted to the same premises, and brought this action to recover them, against the defendants, who claimed under *Mary Lincoln*.

The question for the opinion of this Court was, whether *Mary Lincoln* was entitled to the copyhold premises by descent, or the lessor of the plaintiff under *G. Wright's* will. In the former case judgment was to be entered for the defendants; in the latter for the plaintiff.

G. Hayes for the defendants. The principal question is, whether copyhold property passes by the devise of an heir at law who has not been admitted, nor surrendered to the use of his will. *King v. Turner* (a) is in point for the defendants. Sir *L. Shadwell*, V. C., there thought that stat. 55 G. 3. c. 192., which made wills valid without surrender, applied only to cases in which nothing but a surrender was wanting to make the will good: he cited *Doe dem. Nethercote v. Bartle* (b), where this Court held that the statute did not apply to cases in which the surrender was not a mere form, but was accompanied by something (in that case the examination of a married woman apart from her husband) which

(a) 2 Sim. 545.

(b) 5 B. & Ald. 492.

rendered it matter of substance: he seems to have thought that the payment of the lord's fine by the heir was also such an act accompanying the surrender as made it matter of substance: and he held that the devise of an unadmitted heir was not made good by the statute. It is true that in *Right dem. Taylor v. Banks* (a) this Court gave a contrary decision: but that case may in some respects be open to reconsideration. The lord's fine would be altogether lost, if it were established that the copyholder might devise without being admitted. [*Patteson J.* Is it any where laid down that, in such a case, the party taking under the will has a right to be admitted without paying the heir's fine? The lord might refuse to admit him till that were paid.] In *Fearne's Posthumous Works*, p. 106. (*Cases and Opinions*), the subject is thus discussed:—"There can be no question that the heir, is compellable (if the lord please) to come in and pay the fine due on a descent; and it is said, that where the lord is to have a fine, there must be a new admittance; vide *Moor*, 465. (b). If so, I should think the lord may (if he please) refuse a surrender by the heir, until he has paid the fine on the descent. Indeed, if he could not, the lord might be disappointed of his fine; for after the accepting of the surrender tendered by the heir, though a conditional one, and the surrenderee's being admitted on the forfeiture of the condition, who of course could be liable to only the alienation fine on such an admission, where would be the lord's remedy for his fine upon the descent? And though the lord cannot compel the heir to come in

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(a) 3 B. & Ad. 664.

(b) Pl. 658. *Tiping v. Bunning*.

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and be admitted, and pay his fine, during the life of the tenant for life, yet if the heir require to surrender before, I apprehend, the lord may refuse accepting his surrender until he pay such fine; for otherwise he may be disappointed of it, by accepting the surrender from the heir to the use of a stranger, who would be entitled to admission under it, (even though conditional, if forfeited,) upon payment of the alienation fine only." [Lord *Denman* C. J. That shews only that the lord may refuse to accept the surrender till the fine is paid, but is bound if he accept it without payment.] It shews that the payment of the fine is a substantial act on the part of the heir. In *Coke's Copyholder*, sect. 41., where the distinction is pointed out between an heir and a surrenderee, it is said that, on descent of copyhold, the heir, though not complete tenant till admittance, may (among other things) "surrender into the hands of the lord to whose use he pleaseth, satisfying the lord his fine due upon the descent." That is stated as a condition. The payment of the fine is the substantial act, on performance of which by the heir, the lord, upon the occasion of a surrender, dispenses with a formal admittance. In *Brown's Case* (a), the point is stated as in *Coke's Copyholder*; and there are dicta to the same effect in *Brown v. Dyer* (b) and *Morse v. Faulkner* (c). [Patteson J. The expression in the last case is, that the lord is entitled to the *double* fine on the surrender. He is entitled to the heir's fine, when the surrenderee is admitted.] He may dispense with admittance, but he claims the admittance fine. The view now taken of the heir's pay-

(a) 4 Rep. 22 b.

(b) 11 Mod. 73.

(c) 1 Anstr. 13.

ment of his fine, as the essential to admittance, and as the condition of any surrender to be made by him, is further confirmed by 1 *Watk. on Copyholds*, 302 (a), 1 *Scriven on Copyholds*, 410. (b). That the form of admittance is immaterial, if there be an act from which it may be implied, appears from *Gilb. Tenures*, pp. 282, 283.; and in this and all the treatises acceptance of a fine is considered tantamount to admittance. The heir's fine is independent of any transfer; it attaches when the estate devolves; and the power which the lord has to enforce payment is by compelling the heir to be admitted. [Lord Denman C. J. You call on us to review the decision in *Right dem. Taylor v. Banks* (c).] Lord Tenterden there said, that no authority appeared from which it could be inferred "that the lord's fine was to be paid as a condition precedent to the validity of a surrender by the heir at law." [*Patteson* J. What authorities are there which were not cited there?] The authorities were not presented to the Court in the same point of view as now. [*Patteson* J. The very question now before us was decided there. Lord Denman C. J. And after time taken for consideration.] It must be admitted that the decision in *Right dem. Taylor v. Banks* (c), was confirmed by Lord Brougham, C., in *King v. Turner* (d), on appeal. Another point in the present case is, that the testator, in his enumeration of messuages, lands, and real estate, devised, does not mention his copyhold premises; but, as he had no "real estate" except the copyhold, this

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(a) Chap. 7.

(b) Part I. chap. 7.

(c) 3 B. & Ad. 664.

(d) 1 Mylne & Keen, 456.

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objection cannot be urged. [*Patteson J.* There was nothing else which could satisfy the devise.]

Per Curiam (a).

Judgment for the plaintiff (b).

Joseph Addison was to have argued for the plaintiff.

(a) Lord Denman C. J., *Littledale*, *Patteson*, and *Williams Js.*

(b) See 2 *Bac. Abr. Copyhold* (G), 1. 3., pp. 208, 209., 214. (7th ed.)

Saturday,
June 4th.

The KING against The Inhabitants of MAIDSTONE.

Settlement by apprenticeship cannot be gained by service under a second master, with the assent of the first, unless such assent be given to the particular service.

Quære, whether such assent can relate back to a service previously performed. But,

Held that, where a parish apprentice had served without such assent, until October 1. 1816, (after which, by stat. 56 G. 3. c. 139. s. 9., no parish apprentice could gain a settlement by service under a transfer made without consent

ON appeal against an order removing *Benjamin Drywood*, and his wife and children, from the parish of *St. Mary, Northgate*, in the city of *Canterbury* and county of the same city, to the town and parish of *Maidstone*, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The pauper *Drywood* was, in *June* 1814, bound as a parish apprentice to one *Pollard* of *Milton*, basket-maker, with whom he lived under the indenture at *Milton* until *August* 1816, when, *Pollard* having failed and having no means of employing him, *Drywood* expressed a wish to go and endeavour to procure work in the basket-making business, and mentioned *Maidstone* as a place where it was likely to be procured. There were at that time several basket-makers in *Maidstone*; but no mention was made of the name of any of them. *Pollard* consented to the pauper's going; but said that, if he got work, he (*Pollard*) should expect to be allowed a trifle out

of justices,) a ratification by the master after that day, without consent of justices, could not render the prior service valid for the purpose of settlement.

of

of his wages. To this the pauper assented; and he thereupon left *Milton*. *Pollard* heard no more from *Drywood*, nor did he make any inquiry about him; but, having occasion to go to *Maidstone* in *November* or *December* in the same year, he casually heard from a traveller that *Drywood* was then working with a basket-maker named *Peters*, in that town; and he called on *Peters*, and found him there; and it appeared that he had worked and resided there upwards of forty days before *October* 1st 1816, on which day stat. 56 G. 3. c. 139. came into operation. *Pollard* then asked for a portion of *Drywood*'s wages: but, being told by *Peters* that the wages were barely sufficient for *Drywood*'s support, he went away. The pauper continued after this to work for *Peters*, and to reside in *Maidstone*, several months, when he left that place; but he never returned into *Pollard*'s service, or paid him anything on account of what he earned. The question for the opinion of this Court was, whether the service and residence of *Drywood* with *Peters*, as above mentioned, were sufficient to confer a settlement in *Maidstone*.

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Kelly and *Shee*, in support of the order of sessions. The service at *Maidstone* was a service under the indenture. The great criterion in such cases has been, whether the first master can be said to have concurred in the second service, without putting an end to the original relation of master and apprentice. *Rex v. Banbury (a)*, in which three Judges held that a settlement was gained by residence during service with the third master, very much resembles this case. Some

(a) 5 B. & Ad. 176.

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circumstances in the present case render it even stronger than that, namely, the stipulation of the first master for a part of the pauper's wages in his new service, and his actual demand of such part after the pauper was in the service. The only material distinction between this case and *Rex v. Banbury (a)* is, that the first master, there, assented to the pauper's service with a person who was named, before the pauper entered such service. But it is not necessary that there should be a previous consent to a service with the particular individual. In *Rex v. Banbury (b)* *Patteson J.* observes: — "I should say, in general, that whenever the original contract continues, and the apprentice, with the consent of the first master, works at a trade with a view to be taught that trade, he must be considered as living with the person under whom he so works, in the character of an apprentice." [*Patteson J.* Two or three words are left out there, which would have been better added. The language must be viewed with reference to the subject-matter of the case. I meant to speak of the consent of the master to a service with the particular person.] Here it must be contended on the other side, not only that there must be such a consent, but that it must be previous to the service. *Rex v. Bradninch (c)* and *Rex v. Bradstone (d)* shew that it need not be previous. *Rex v. Crediton (e)* and *Rex v. St. Helen Stonegate (g)* may be relied upon as authorities against this order; but in those cases the ground of decision was that the assent did not sufficiently appear. In *Rex v. Whitchurch (h)*, which may

(a) 5 B. & Ad. 176.

(b) 5 B. & Ad. 187.

(c) 2 Bott, 452. pl. 570. 6th ed.

(d) 2 Bott, 454. pl. 573. 6th ed.

(e) 1 East, 59.

(g) 1 East, 285.

(h) 1 B. & C. 574.

also

also be cited, the relation of mistress and apprentice was clearly put an end to when the pauper went into his second service, under a yearly hiring. The settlement here is not affected by stat. 56 G. 3. c. 139. s. 9., which enacts that, from and after *October 1st, 1816*, no master or mistress shall put away or transfer any parish apprentice without consent of justices, and that no settlement shall be gained by service after such putting away or transfer, unless such consent shall have been given. Here there had been forty days' service with the second master before the 1st of *October 1816*: the consent of the first master was subsequent; but it was a *ratihabitio* which related back.

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Bodkin, *contra*. If a settlement had not been gained on the 1st of *October 1816*, the express words of stat. 56 G. 3. c. 139. s. 9. would prevent its being acquired afterwards. Then, as to the settlement before *October 1st*. It is a general rule, to be deduced from the cases, that, to give a settlement by service with a second master, there must be an express consent by the first, to the particular service. Service without even the knowledge of the first master has never been held sufficient. In *Rex v. Crediton* (a) and *Rex v. St. Helen Stonegate* (b) there was knowledge; but that (though attended with acquiescence) was not held sufficient. In *Rex v. Shebbear* (c) Lord *Kenyon* thus distinguished *Rex v. Crediton* (a) from the case then before the Court. "In the former case we were satisfied that the master did not really mean to give a particular assent to the second service: he had there told the apprentice to go

(a) 1 *East*, 59.(b) 1 *East*, 285.(c) 1 *East*, 72.

where

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where he pleased, having no further occasion for him, and when the apprentice told him where he was going, he answered that he might go there or any where else. But here the master was applied to for his consent to the particular person named; and he expressed his approbation of the apprentice going there, telling him that it would be advantageous to him to learn the trade. This then was not an indiscriminate leave to serve any person, but a particular consent to a particular service; and this is the plain line of distinction between all the cases; which it is to be hoped will make an end of all such questions in future." *Rex v. Whitchurch* (a) is also decisive on this point. In *Rex v. Banbury* (b), where a settlement was held to be gained by the last service, the facts strongly proved a particular consent; the master not only knew of the service, but promised the apprentice a watch to induce him to continue; and the Lord Chief Justice there said "There must" — "be a binding, as well as an inhabitation in a parish to give a settlement. But the authorities shew, that where a party has been bound apprentice in one parish and *expressly permitted* by his first master to work for another in a different parish, the service to the second master is, constructively, a service under the indenture." In *Rex v. Bradninch* (c) and *Rex v. Bradstone* (d) the assent to the second service was given after the pauper had entered it; but there was a service, in each case, after the assent, sufficient to give a settlement.

Lord DENMAN C. J. We certainly had no intention,

(a) 1 B. & C. 574.

(b) 5 B. & Ad. 176.

(c) 2 Bott, 452. pl. 570. 6th ed.

(d) 2 Bott, 454. pl. 573. 6th ed.

in *Rex v. Banbury* (a), of interfering with the rule formerly laid down by the Court on this subject. The decisions in *Rex v. Crediton* (b) and *Rex v. Whitchurch* (c) are not affected by that case. Here there is no consent to the particular service unless we import the ratification; and that cannot be done, because, under stat. 56 G. 3. c. 139. s. 9., the settlement ought to have been acquired before the 1st of *October* 1816; and there was no consent before that day.

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LITLEDALE J. The only ground of settlement here is something done by the master in the nature of a parol assent. But the assent to the service with *Peters* was not given till *November* or *December* 1816: whereas, to take the case out of stat. 56 G. 3. c. 139., the settlement ought to have been complete by the 1st of *October* 1816. But for that, I do not say how the case might have stood.

PATTESON J. Whether or not the decision in *Rex v. Banbury* (a) contradict former ones, is of no importance here. The present question is, whether the facts in this case, that the first master, casually hearing that the apprentice was working for *Peters* at *Maidstone*, called there, and asked for a portion of his wages, relate back so as to establish a service under the indenture before *October* 1st, 1816. None of the cases go so far. In *Rex v. Bradninch* (d) and *Rex v. Bradstone* (e) there was more than forty days' residence in the new service, after the assent. The statute 59 G. 3. c. 139.

(a) 5 B. & Ad. 176.

(b) 1 East, 59.

(c) 1 B. & C. 574.

(d) 2 Bott, 452. pl. 570. 6th ed.

(e) 2 Bott, 454. pl. 573. 6th ed.

does

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does not provide for a case of this kind. Unless by relation back, there was no express assent to this service before *October 1st, 1816*; and none of the cases shew that, without such assent, the apprentice can acquire a settlement in the service of a second master.

WILLIAMS J. The ground on which any settlement is gained in a case of this kind is service under the original indenture. To establish that, it is reasonable that the original master, at the time of giving the assent relied upon, should have known with whom the apprentice was serving: and in the cases, without exception, where the settlement has been upheld, that has been so. In *Rex v. Banbury (a)* the first master knew and assented to the service under the particular persons with whom [the apprentice worked on leaving him: in one instance he pointed out the person to whom the apprentice should go. Here no such facts occurred. As to the subsequent consent, even if the statute had not intervened, I do not say what its effect might have been; but it is clear that such a consent did not make the residence with *Peters* a residence under the indenture with the approbation of the original master before *October 1st, 1816*. And an assent to the particular service was necessary to the settlement.

Order of sessions quashed (b).

(a) 5 B. & Ad. 176.

(b) See *Rex v. Shipton*, 8 B. & C. 88.; *Rex v. St. Martin's, Exeter*, 2 A. & E. 655.

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The KING *against* The Inhabitants of COWPEN. *Saturday, June 4th.*

ON appeal against an order of two justices, whereby *William Dodds*, his wife, and children, were removed from the parish of *St. Nicholas*, in the town and county of *Newcastle-upon-Tyne*, to the township of *Cowpen*, in the parochial chapelry of *Horton*, in *Northumberland*, the sessions affirmed the order, subject to the opinion of this Court upon the following case.

The pauper *William Dodds*, then being unmarried, was hired, with others, to the proprietors of *Cowpen* colliery, by a written agreement dated 5th of *April* 1816, from the day of the date till 5th of *April* 1817, to hew, work, fill, and drive coals, and to do such other work as should be necessary for the carrying on the colliery, as they should be required and directed to do by the owners, &c., at the respective prices, &c., and on the following, amongst others, the terms and conditions therein contained. That the sums or forfeitures, required to be paid by the parties thereby hired for such days as they should respectively lay

Pauper was hired by the proprietors of a colliery, from 5th *April* 1816 to 5th *April* 1817, to work as should be necessary for carrying on the colliery, and as he should be required to do by the owners, on the terms that the forfeitures, to be paid by him for such days as he should lay himself idle, should be paid to him to the same amount by the proprietors for every day he should be laid idle by them, except on the pay *Saturdays*, when the pit was going single shift; but, when the pit was going double shift, the

men were to work one shift on the pay *Saturdays*, to make each shift work eleven days; that he should, except when prevented by sickness, &c., do a full day's work on every working day, except a single shift pit on the pay *Saturdays*; and, in default thereof, forfeit for every default 2s. 6d.; that he should be paid his wages every fourteen days; and that nothing in the agreement should prejudice the legal remedies belonging to masters and servants, or the jurisdiction of the magistrates. The following facts also were stated in a case sent from sessions. — Pay *Saturday* is every alternate *Saturday*. The ordinary day's work of a pit is twelve hours; the pit is then said to go single shift. When it is worked all the twenty-four hours, it is said to go double shift; in the latter case, workmen work ten and twelve shifts (of twelve hours each) in alternate fortnights respectively; the proviso as to working one shift on pay *Saturday* applies only to men working twelve shifts in the fortnight. Sometimes, when a pit is working double shift, a necessary job requires a few individuals (but rarely, if ever, the whole pit's crew) to remain in the pit, after the shift to which they belong has finished work. The pauper worked sometimes single shift, and sometimes double shift:

Held an exceptive hiring.

themselves

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themselves idle, should be respectively paid to them to the same amount by the proprietors of the colliery for each and every day they should be laid idle by the proprietors, except on the pay *Saturdays* when the pit is going single shift; but, a pit going double shift, the men must work one shift on the pay *Saturdays*, in order to make each shift work eleven days: that the parties hired should, except when prevented by sickness, or other sufficient or unavoidable cause, do and perform a full day's work on each and every working day (except a single shift pit on the pay *Saturdays*), or such quantity of work as should be deemed fairly equal to a day's work, and should not leave their work until such day's work or quantity of work should be fully performed or finished to the extent of each man's ability; and, in default thereof, each of the said parties hired, and so making default, should for every such default forfeit and pay to the proprietors 2s. 6d.: and it was further agreed by the proprietors that every workman should be paid his earnings or wages every fourteen days, subject to such deductions as therein mentioned: and it was mutually agreed, &c. (that disputes should be referred to arbitration): and it was declared that nothing therein contained should be construed to extend to alter, prejudice, lessen, or otherwise affect, the legal remedies and powers which by law belong to masters and servants in their respective relation to each other, or to magistrates having jurisdiction in cases of dispute or difference between them.

The pauper worked from the said 5th of *April* 1816 to the 5th of *April* 1817, under the said agreement, sometimes single shift and sometimes double shift. He resided the whole year in the appellant township. Pay
Saturday

Saturday is every alternate *Saturday*. The ordinary day's work of a pit is twelve hours, which is called a shift; and, when all the men are employed at the same time, and the working of a pit does not continue longer than twelve hours in the day, a pit is then said to be a pit working or going single shift. It frequently happens that it is necessary that the working of a pit should be carried on all the twenty-four hours; in which case the complement of men and boys is divided into two sets, or gangs, called shifts. These shifts relieve each other every twelve hours. When this is the case, a pit is said to be working or going double shift. (The case then described at length the routine of working at a pit going double shift; and it appeared, from the statement, that a workman, working double shift, would be liable to work ten and twelve shifts respectively in alternate fortnights; and it was added that the proviso respecting working double shift on pay *Saturday* applied only to such workmen as had the twelve shifts to perform in the fortnight (a).) It sometimes happens, when a pit is working

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(a) The following are the words of the case. "One of these shifts is called the fore shift, and the other the back shift. The fore shift begins work at two o'clock on the *Monday* morning, and works twelve hours on that morning and every morning during the fortnight, except on the *Saturday* morning in the second week of the fortnight, which is the pay *Saturday*: the back shift begins work at two o'clock on the *Monday* afternoon, and works twelve hours on that afternoon and every afternoon during the fortnight, except on the *Saturday* afternoons, when it does not work. In such a course of working, the fore shift has worked eleven shifts or days' work, and the back shift ten shifts or days' work. In the second fortnight the shifts are changed: the fore shift of the fortnight preceding becomes the back shift of this; and the back shift of the fortnight preceding becomes this fortnight's fore shift. The fore shift of this fortnight begins work at two o'clock on *Monday* morning, and works twelve hours on that morning and every morning during the fortnight, except on the *Saturday* morning in the second week of this fortnight, which is the pay *Saturday*. This shift

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working double shift, that some job of necessity occurs which requires a few individuals to remain down the pit after the shift of men to which they belong have finished their work, and the next shift has commenced work. This is technically called standing double shift: this only applies to individuals, rarely, if ever, to a whole pit's crew.

T. Greenwood in support of the order of sessions. This is not an exceptive hiring. The agreement may be divided into two parts: one is the actual contract of hiring; the other is the description of the way in which the pit is to be worked. The question must be determined entirely by the contract, and not by any custom as to the manner of working. It will be argued, on the other side, that the requisition that the parties hired should pay for the days on which they are idle implies a power to abstain from work on payment of the fine; and that the provision as to a full day's work shews that it was contemplated that, on some days, less than a full day's work should be performed. But it appears

works eleven shifts or days' work this fortnight, which, with the ten shifts of the fortnight preceding, makes twenty-one shifts or days' work. The back shift of this fortnight begins work at two o'clock on the *Monday* afternoon, and works twelve hours on that afternoon and every afternoon during the fortnight, except on the *Saturday* afternoons. The back shift works ten shifts or days' work during this fortnight, which, with the eleven shifts of the fortnight preceding, make twenty-one shifts or days' work. The words, 'but a pit going double shift, the men must work one shift on the pay *Saturdays*, in order to make each shift work eleven days,' are applicable only to the men forming the fore shift of the second week in each fortnight, who have worked twenty-one shifts in the two fortnights, and who, under this clause, begin work at two o'clock on the pay *Saturday* morning, and work twelve hours, which make twenty-two shifts or days' works for two fortnights, or eleven shifts or days' work for one fortnight."

from

from *Rex v. Byker* (a) that such terms do not make the hiring exceptive. Then it may be said that the express mention of working days shews that some days were not to be working days. But *Rex v. Byker* (a) is an authority against this argument also. *Rex v. St. Helen's Auckland* (b) is to the same effect. It is true that, in that case, the contract contained a stipulation that the men should work "constantly," or pay the forfeit; but the positive part of the contract is equally strong here. In each case, the entire time is, in the first instance, given to the master by the agreement. In *Rex v. Ossett-cum-Gawthorpe* (c) the contract limited the number of working hours, and also contained a clause for deducting wages if their whole time was not given; yet it was held not to be an exceptive hiring. Then it will be contended that the clause relating to the pay *Saturday* constitutes an exception; but this is merely a regulation as to the arrangement of the business to be transacted. It is necessary to set apart a day for paying the men: on this day the hirers do not find it convenient to call for a full day's work. That is not a limitation of the service: the relation of master and servant continues uninterrupted. There appears to be a liability to ordinary or extraordinary service throughout the fortnight: the master determines when the extraordinary service shall be called for. *Rex v. Gateshead* (d), in which the hiring was held to be exceptive, was cited in *Rex v. Byker* (a), and perhaps is not altogether distinguishable from that case; but, there, it was not stated that the contract, in the first instance, bound the party hired, as here, to do such work as should be necessary and re-

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against
The Inhabit-
ants of
COWREN.

(a) 2 B. & C. 114. (b) 4 B. & Ad. 718.

(c) 4 B. & Ad. 216. (d) Note (c) to *Rex v. Byker*, 2 B. & C. 117.

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quired, but only to work a certain quantity "on each working day." In *Rex v. Birmingham (a)*, where also the hiring was held to be exceptive, the obligation, in the first instance, was only to work for a certain number of hours; here the contract is unlimited, except that the custom of the colliery is afterwards set out: such a custom does not, however, control the discretion of the masters. Again, in *Rex v. Birmingham (a)* there was a provision that the party hired might make as much overwork as he pleased: that shewed that, as to some of the time, he was not under the control of the master. In *Rex v. Frome Selwood (b)* the hiring was held to be exceptive because the hours of work were limited: there the limitation was part of the contract; here it is merely descriptive of the regulations of the colliery, the masters having the power to call for more work. If, in the present case, any time, however small, can be pointed out during which the controul of the masters did not exist, the hiring is exceptive; but no such time can be shewn.

Cresswell, and *Hedley*, contra. This is a stronger case of exception than *Rex v. Gateshead (c)*. Here the exception as to the pay *Saturday* appears expressly on the contract. On the pay *Saturday*, if the pit was working single shift, the relation of master and servant would not exist; the magistrate would not receive a complaint upon matters then arising. In *Rex v. Byker (d)* there was no exception, but only a number of hours named upon which the amount of wages was to depend; and the case

(a) 9 B. & C. 925.

(b) 1 B. & Ad. 207.

(c) Note (c) to *Rex v. Byker*, 2 B. & C. 117.

(d) 2 B. & C. 114.

is decided by the Court on that ground, which distinguishes it from *Rex v. Gateshead* (a) : in *Rex v. Birmingham* (b) there was a limitation of the time, and, on that ground, the Court expressly distinguished the case from *Rex v. Byker* (c) : and *Rex v. Birmingham* is confirmed in *Rex v. Frome Selwood* (d). [Patteson J. referred to *Rex v. Norton Bavant* (e).] No stress can be laid on the fact that, in case of accident, a man may be asked to work over the usual time. [Lord Denman C. J. Suppose, on such an accident arising, the party hired were required to work, and refused : would not a magistrate have jurisdiction under the words at the commencement of the contract?] He would not, in the case of a single shift pit on pay *Saturday* : the introductory words are explained by what follows. Sundays are also excepted, as appears by the number of shifts.

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against
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ants of
COWPEN.

LORD DENMAN C. J. I think there is a little ambiguity in the way in which the case is stated. First, it is stated that, by written agreement, the men were hired to hew, work, fell, and drive coals, and to do such other work as should be necessary for carrying on the colliery, and as they should be required and directed to do by the owners ; and then it adds, " on the following, amongst others, the terms and conditions therein contained." The contract is not quite satisfactorily set out. We must, however, put our construction on what we find. I think the earlier part of the contract, as described, must be understood with reference to what follows. So limited, the hiring is certainly exceptive.

(a) Note (c) to *Rex v. Byker*, 2 B. & C. 117.

(b) 9 B. & C. 925.

(c) 2 B. & C. 114.

(d) 1 B. & Ad. 207.

(e) 3 A. & E. 161.

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The KING
against
The Inhabit-
ants of
Cowpen.

I need not go through the cases : here is an exception of the pay *Saturday* and the *Sunday* : during the excepted times the pauper was his own master.

LITLEDALÉ J. concurred.

PATTESON J. I am of the same opinion, on the short ground that the pauper was hired for eleven days only out of fourteen.

WILLIAMS J. concurred.

Orders quashed.

Saturday,
June 4th.

The KING against JOHN JOHNSON.

Overseers' accounts being allowed, and an appeal against them dismissed, the allowance and order of sessions were brought up by certiorari, and an item appeared to be for the expenses of defending an appeal against overseers' accounts. This Court quashed the allowance and order, such an item being bad on the face of it, inasmuch as no supposable facts could justify it.

IN the accounts of the overseers of *Clotton Hoofield*, in *Cheshire*, for the year 1833, 1834, the following item appeared :—

1834. *March 25.* Paid Mr. *Hostage* for £. s. d.
preparing for trial, attending sessions,
counsellor, &c., defending the appeal
against the overseers' accounts at the
quarter sessions in *July* and *October* - 23 11 4

The present accounts having been allowed by two justices, the sessions, on appeal, confirmed the allowance. The accounts, and the order of sessions, were brought up by certiorari; and *Chandless*, in *Easter* term 1836, obtained a rule to shew cause why the allowance and the order of sessions should not be quashed.

W. H. Watson

W. H. Watson now shewed cause (a). The objections must be confined to matter appearing on the face of the accounts; *Rex v. James* (b). Every thing will be intended in their favour. It does not appear to what year the accounts referred to in the item belonged: even if they were the accounts of overseers of a bygone year, there is nothing illegal in the allowance of the item. The overseers are not to be required to defend the parish accounts at their own expense. The parish may reasonably contribute from its fund. In *Rex v. Gwyer* (c) *Taunton J.* says, "although the charges may have been reasonable, still, if the Court sees that they were not necessarily connected with the fulfilment by these parties of their office as overseers, they cannot be allowed;" and he cites *Wilcock on the Laws, &c., of the Poor*, where it is said (d) that the overseers are entitled to charge the costs of an appeal, though decided against them, unless they have been guilty of gross misconduct, or neglected to consult the vestry as to the propriety of proceeding.

Sir *W. W. Follett* and *Chandless*, contra. The passage cited states only that the overseers "are entitled to charge in their accounts whatever they have spent for the parish." This item relates, not to the parish, but to the overseers personally. [*Patteson J.* Might not the parish be interested?] They might against the allowance, but not in its favour. The overseer is to ac-

(a) Some objections taken to the accounts, and not decided upon by the Court, are not noticed in the report.

(b) 2 M. & S. 321.

(c) 2 A. & E. 236. See, as to surveyors' accounts, the remarks of the Court during the argument in *Rex v. Fowler*, 1 A. & E. 836.

(d) Page 281.

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count between himself and the parish. His remedy, if his accounts be improperly appealed against, is in the allowance of costs by the justices. [Lord *Denman* C. J. Suppose the vestry had directed an overseer to incur a particular head of expense, and had engaged to indemnify him ; and the sessions, on appeal, were to allow it, but were to refuse costs, on the ground, for instance, of the question being new.] In *Rex v. Gwyer (a)* the items disallowed had been actually authorised by the vestry.

LORD DENMAN C. J. I suggested the strongest case which I could conceive. But we think that even such a case would not justify the allowance of this item. An overseer must take his chance of being repaid in the regular way ; and the vestry cannot bind the parish to an extent not authorised by the legislature. The overseer must perform the duty imposed upon him, and must take the consequences of acts done by him in his public character. The allowance or disallowance of his accounts is a matter entirely between him personally and the parish. The item cannot be allowed.

LITLEDALE J. The objection arises on the face of the accounts. If any supposition could be made justifying the allowance of this item, we would allow it. The strongest case put is that the vestry might have ordered the particular expenditure. Then the accounts having been objected to, an appeal against them is discharged, and no costs appear to have been given to the respondent. It is said that, upon such a state of things, the vestry should indemnify the overseer, and the parish make the payment. But, if the justices do not give

(a) 2 A. & E. 216.

costs, we cannot allow the item by way of indemnity: the justices must exercise a discretion whether costs are to be allowed or not; and the overseer is confined to that remedy.

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PATTERSON J. We should be bound to allow this item if any case could be supposed in which it was legal. But, if the whole vestry had assembled, and had directed the expenditure, and the present appellant himself had been there, and had assented, — which is a violent supposition, — still we cannot say that such an item should be allowed.

WILLIAMS J. I can suggest no supposition of facts which would legalise such a payment.

Rule absolute.

The KING against HEATH.

Saturday,
June 4th.

AT the *Sussex* quarter sessions, *January* 1835, an order of filiation was made on *Charles Heath*, subject to the opinion of this Court on the following case: —

Eliza Penfold, of the parish of *Stopham*, single woman, was, on the 16th *August* 1834, delivered of a bastard child, which, on 29th *September* 1834, became

The sessions made an order of filiation, subject to the opinion of this Court on a case stating that the child was born on 16th *August* and became chargeable on 29th *September*; that the ses-

sions next after 29th *September* were held on 13th *October*, that no application was made by the overseers till the *January* sessions following, nor any notice served on the party charged till *December*, and that the sessions considered the application made in time, and that it was not necessary for the officers to shew that they had made diligent inquiry as to the father before the *October* sessions:

Held that, on the case so stated, the order was bad under stat. 4 & 5 *W. 4. c. 76. s. 72.*, no excuse appearing (if any could be admissible) for the application not having been made at the *October* sessions.

chargeable

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chargeable to *Stopham*, and continued so until the making of the order. The sessions for the county, next after 29th *September* of 1834, were holden on the 13th of *October* in the same year. No application was made by the overseers of *Stopham* for an order on *Charles Heath*, in respect of the said child, until the *January* sessions; nor was notice of such application served on him until 9th *December* 1834. It was objected, on the part of *Heath*, that the sessions holden in *January* 1835 had no jurisdiction. The objection was overruled. The Court also held that it was not necessary for the overseers to shew that they had made diligent enquiry as to the father of such child before the *October* sessions; and that, although the child became chargeable on the 29th of *September*, the application to the *January* sessions was in time under the provisions of the statute.

Darby, against the order of sessions, was desired to begin. Stat. 4 & 5 *W. 4. c. 76. s. 72.* enacts that, when a child has been born a bastard and become chargeable, the parish officers “ may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions ” “ after such child shall have become chargeable,” for an order on the person whom they charge as father. It was held by *Coleridge J.*, in *Rex v. The Justices of Oxfordshire (a)*, that “ next ” here meant the next sessions after the child’s birth, and the mother’s first becoming chargeable in respect of it, subject to a discretion, to be exercised by the justices (and liable to the supervision

(a) 5 *Dowl. P. C.* 116.

of this Court), as to allowing a later application where the delay is occasioned by ignorance who the father is, or inability to procure evidence against him, taking into consideration whether the officers have used due diligence, and all the circumstances of the case. In that case, no sufficient reason appearing to excuse the delay, the learned judge refused a mandamus to the justices to enter continuances and hear the application. He also decided that the argument drawn from sect. 73, that the *hearing* might be more than six months after the birth, did not affect the question when the *application* should be made. That case decides the present; for here the case expressly shews that there was no proof of excuse for the delay; and no discretion has been exercised. Sect. 76 gives a power of distress and attachment of wages against the party charged: the provisions will, therefore, be construed strictly. He ought to have the earliest possible notice: otherwise the application might be delayed till his means of obtaining evidence in answer were gone. According to the decision of the sessions, the officers might apply to any sessions held within seven years from the birth. Sect. 73 enacts "that no such application shall be *heard at such sessions*" unless fourteen days' notice has been given to the party charged; but, if, "previously to *such sessions*," that is, to the next sessions, there has not been time to give such notice, the *hearing* is to be deferred to the next sessions. The intention of this is to compel the officers to elect immediately; so that, if the birth or chargeability occur within fourteen days before any sessions, the proper method is to apply immediately, and respite the hearing. But, even if sect. 72 should be construed to apply to the next

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sessions after the party is discovered, the evidence procured, and the service of notice practicable, this order must be quashed, for nothing appears in the case to justify the delay; and it lies on the party who has not complied with the direct words of the enactment to shew an excuse. The legislature clearly intended to give additional protection to the party charged.

W. H. Watson, *contra*. Sect. 72 cannot be construed strictly; for it must often happen that the father cannot be discovered before the sessions next following the birth and chargeability. The case does not shew that the officers knew who the father was before the *October* sessions. There were, at most, only two days for the inquiry: for the child did not become chargeable till *September* 29th, and the sessions were held on *October* 13th, fifteen days after. In *Rex v. The Justices of Oxfordshire* (a) the decision was that application must be made to the next practicable sessions. Perhaps, after that case, it cannot be contended that the enactment is merely directory. But there the officers knew the father, and actually gave him fourteen days' notice, before the sessions at which they failed to make application. Sect. 73 speaks of a case where the birth has taken place more than six months before the hearing; and this shews that the chargeability also may be six months before the hearing: for the order is to cover the costs of maintenance for the six months; and it cannot have been intended that there should be an order for a time during which there has been no chargeability. [*Patteson J.* That is, if "the Court shall think fit to

(a) 5 *Dowl. P. C.* 116.

make an order thereon:" they would not make an order for expenses not incurred.] The legislature at least contemplates the possibility of six months' maintenance being incurred before the hearing, and this is sufficient for the argument. Besides, it must often be impossible to procure evidence before the next sessions. Again, the becoming chargeable is indefinite; a slight relief may be given one day, a little more six months after, and so on. Every fresh charge is a becoming chargeable.

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LORD DENMAN C. J. The point taken at the sessions was, that they had no jurisdiction: that depends on sect. 72. [His Lordship here read the section.] It is clear that the words "next general quarter sessions" do not mean whatever sessions the officers choose to select. It is reasonable that there should be some limitation; otherwise the officers might wait till the evidence in defence was lost. It was meant that the overseers should act promptly. Whether the sessions were to be the next after the child became chargeable, or after the father was discovered, diligent inquiry having been made, or whatever construction we adopt, the application here was too late. "Next" must mean next after something: here the Epiphany sessions were not the next after anything which can be pointed out.

LITLEDALE J. On the whole I am disposed to think that sect. 72 is not merely directory. Whether the sessions applied to must be the next after the chargeability, or the next after the discovery of the

(a) 5 Dowl. P. C. 118, 119.

father

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father, it is not necessary, as this case is stated, to determine: and I am not without doubt on that point. Whether, if the sessions next after chargeability were meant, and it became impossible to apply to them from the father not being discovered, we should then be bound to put a construction on the act which would make the application practicable, may be questioned: I do not say that we should. There certainly is a limitation. As this case stands, I cannot say that there was any jurisdiction at all. It is not stated when it was first known who the father was, nor whether it was possible to give him fourteen days' notice of the next *October* sessions. We cannot assume the existence of any special circumstances which are not stated.

PATTERSON J. I do not see how we can avoid the conclusion to which my Lord and my Brother *Littledale* have come. Where the words of a statute are plain and intelligible, what right have we to alter their effect with a view to prevent consequences which we may consider mischievous? Sect. 72 enacts that, when any child shall be born a bastard, and become chargeable, the officers may, if they think proper, after diligent inquiry as to the father, apply to the next quarter sessions "after such child shall have become chargeable." All that is meant by the words "if they think proper" is that they are not bound to apply at all. The words which follow are very plain. The case says that the child became chargeable on *September* 29th, and that the officers did not apply at the sessions held *October* 13th: *prima facie*, then, they were too late. This is strongly confirmed by sect. 73, which shews that, where there is not time for fourteen days' notice, appli-
cation

cation should nevertheless be made at the next sessions, and the hearing deferred. Mr. *Watson* says that the next practicable sessions are meant. I do not wish to be concluded as to that. If the child had first become chargeable on the 19th of *October*, I do not say that the officers might not have been relieved from going to the *October* sessions. But it clearly lay on them to shew to the Court that they could not come earlier than the *Epiphany* sessions. Again, if they could not find the father, that might or might not be an excuse for the delay; but then the objection is, that they should shew that they made diligent inquiry; and this they have not shewn. They may have known every thing in time to go to the *October* sessions; if so, they ought to have done it. They are bound, at any rate, to shew the jurisdiction. The sessions have indeed heard the case; but they have done so, subject to our opinion; which was the most expedient course. Their having heard it, furnishes no reason for us to say that they had jurisdiction.

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WILLIAMS J. On the whole, I am of the same opinion. Mr. *Watson's* chief argument turns on the imperfection of the remedy given by sect. 72. Supposing that the remedy is imperfect, we must still adhere to the words. It is objected that the officers are too late in applying at the *January* sessions. What answer do they give? Merely that they have a right to come to those sessions. Supposing it to be true that by the next sessions is meant the next practicable sessions, it does not appear that these were the next practicable sessions.

Order quashed.

1836.

Monday,
June 6th.

DOE on the several Demises of WILLIAMS and
AYRANE against SMITH.

Land and buildings were held by a yearly tenant, the land from 2d February to 2d February, the buildings from 1st May to 1st May. The landlord, on 22d October 1833, served him with a notice to quit the land and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice."

Held that, as to the lands, the notice was to be considered a notice to quit on 2d February 1835; and that the landlord might recover both land and buildings after that day, in ejectment.

EJECTMENT for messuages and lands in *Denbighshire*. The demises were laid on 4th February 1835. On the trial before *Bolland B.*, at the *Denbighshire* Spring Assizes, 1835, it appeared that the defendant had been in possession of the premises, as tenant to *Ayrane*, the lessor of the plaintiff, under a demise of the lands from some day in May 1832, to 2d February 1833, and of the buildings from May 1832, to 1st May 1833: and that he held on, after February and May 1833, without any express contract. On 22d October 1833, *Ayrane* served the defendant with the following notice: — "To Mr. *Francis Smith*. Take notice that you are to quit and deliver up to me, the undersigned, *Henry Owen Ayrane*, the possession of all that messuage or dwelling-house and tenement, with the out-buildings and lands thereunto belonging, now in your holding, situate" &c., "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice, whereof you have this notice, the 21st October 1833. *H. O. Ayrane*." It was objected, on the part of the plaintiff, that the notice was insufficient, because it referred to the *present* year's holding, which would expire in February 1834, less than six months after the notice was served. The learned Judge gave

gave leave to move to enter a nonsuit. Verdict for the plaintiff. In *Easter* term 1835, *R. V. Richards* obtained a rule according to the leave reserved.

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—
Doe dem.
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John Jervis now shewed cause. If the words of the notice had merely been "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding shall expire," it might perhaps have been insufficient; for the tenant was certainly entitled to hold on after that half year, inasmuch as the half year would expire on the 22d *April* 1834, and then a fresh year's holding had commenced, since the tenant's term could only be put an end to in the *February* of some year. But the words which follow, "after the expiration of half a year from the delivery of this notice," remove the difficulty, and shew that it was intended to apply to some time six months after the notice, viz. *February* 1835. [*Patteson J.* "Half a year" is the proper expression; "six months" might be construed to mean lunar months (a).] The Court will give an interpretation to the notice consistent with the intention of the party serving it, if clear. In *Doe dem. Duke of Bedford v. Kightley* (b) a notice, given at *Michaelmas* 1795, to quit "at *Lady-day*, which will be in the year 1795," was held a good notice for *Lady-day* 1796. In *Doe dem. Lord Huntingtower v. Culliford* (c) the notice was dated 27th *September*, and served on the 28th; and it required the tenant to quit "at *Lady-day* next, or at the end of your current year." The current year, in fact, expired on the 29th *September*; but this was held

(a) See judgment of *Bayley J.* in *Johnstone v. Hudleston*, 4 B. & C. 932.

(b) 7 T. R. 63.

(c) 4 D. & R. 248.

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DOE dem.
WILLIAMS
against
SMITH.

to be a six months' notice, on the ground that it could not have been intended to give a two days' notice. There the interpretation was founded on the mere fact of the term of the holding; here the words, "after the expiration of half a year from the delivery of this notice," suggest the interpretation from the notice itself.

R. V. Richards contra. The notice, being delivered in *October* 1833, was too late to determine the tenancy of the lands at the expiration of the "present year's holding," as that holding would expire in *February* 1834, less than half a year from the notice. This might easily mislead the tenant, who in fact did hold the messuages from *May* to *May*, so that, as to them, the present year would expire after six months from the delivery of the notice. The rule is, that the notice must be such as cannot mislead the tenant. The question is, what he might have understood; not what the landlord may have meant.

LORD DENMAN C. J. I think this notice was well enough. It is admitted that it would be a good notice for *May* 1834. The half year would expire in *April* 1834. It would therefore not be a good notice for 2d *February* 1834; but I think that, although the word "present" is used, the notice may be referred to 2d *February* 1835, which was after the expiration of the half year; and that there was no danger of the tenant being misled.

LITLEDALE J. This is certainly a lame and inaccurate notice; but, such as it is, we must endeavour to give it a rational interpretation. The lands are originally
taken

taken to hold from *May* 1832, to 2d *February* 1833, and then they are held on from year to year. On the 22d of *October* 1833, the notice is served. Notice to quit "at the expiration of half a year from the delivery of this notice" could not be a 'good notice as to the lands; for the year for which the lands were holden, at the time of the notice, expired in *February* 1834. But then the notice goes on thus, "or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice." Now such other time at which a year's holding would expire after the expiration of half a year from the delivery of the notice would be, as to the lands, 2d *February* 1835; the word "present" must there be rejected as surplusage. If the 2d *February* 1835 was not meant by "such other time," what time could be meant? It must be some time after 22d *April* 1834; and no part of the "present" year, as to the lands, would be after that day; the word "present" must therefore be rejected, or the notice will be without meaning.

PATTESON J. It is not required that a notice should be worded with the accuracy of a plea. This is not drawn with strict precision; but I think it is sufficiently clear.

WILLIAMS J. concurred.

Rule discharged.

1836.

Doz dem.
WILLIAMS
against
Suits.

1836.

*Tuesday,
June 7th.*

THOMAS SERJEANT and Others, Executors of
JOHN SERJEANT, *against* CHAFY, D. D.

In an action of replevin, commenced after stat. 3 & 4 W. 4. c. 42. came into operation, but in which the declaration was dated before the first day of *Easter* term 1834, the defendant avowed for rent arrear on a demise at an annual rent of 650*l.* Plea, non tennit. The plaintiff gave evidence that the rent was only 500*l.*; and the defendant, before verdict, refused to amend. The jury found for the plaintiff; and found specially that the rent was 500*l.*; and this verdict was indorsed on the record.

Held, first, that the plaintiff must have judgment.

Secondly, that this Court would not amend the avowry, by making it conformable to the holding at 500*l.*, and give judgment on the record so amended.

Thirdly, that the defendant was not entitled to a new trial, in order that he might have an opportunity of amending the avowry as above.

Fourthly, that the Court would not have granted a new trial under these circumstances, even if the declaration had not been dated before the first day of *Easter* term 1834; the defendant's proper remedy, if any, for the mistake in the avowry, being to apply to the Judge at Nisi Prius for leave to amend.

The Court refused to take the summing up of a Judge at Nisi Prius from a short-hand writer's notes.

REPLEVIN. The defendant avowed for rent arrear, on a demise at an annual rent of 650*l.* Plea, non tennit. The action was commenced after 1st of *June* 1833, and after the passing of stat. 3 & 4 W. 4. c. 42.; and the declaration was of *Michaelmas* term 1833. On the trial before *Coleridge* J., at the *Worcester* Spring assizes, 1835, the plaintiff gave evidence to shew that the rent had been reduced from 650*l.* to 500*l.* The defendant's counsel refused to amend the record, before the verdict; the jury found a verdict for the plaintiff, stating that the plaintiff held of the defendant at an annual rent of 500*l.*; and they found the value of the distress to be 1197*l.* 1*s.* The defendant's counsel then applied to have the avowry amended, which the learned Judge refused; but, at the request of the defendant's counsel, he directed their finding to be indorsed on the record, under sect. 24 of the statute. In *Easter* term 1835, *Talfourd* Serjt. obtained a rule to shew cause why judgment should not be given according to the justice of the case, and why the defendant should not be at liberty to amend the avowry, claiming a rent of 500*l.* per annum, instead of a rent of 650*l.*

The

The statements upon which the rule was obtained were, an affidavit, by a short-hand writer, of the learned Judge's summing up at *Nisi Prius*, the finding of the jury, and other matters occurring afterwards in open Court at the time of the trial; an affidavit by the defendant that 1925*l.* was due to him for rent at the rate of 650*l.* per annum, and 1100*l.* at the least, taking it at 500*l.*; and an affidavit of the defendant's attorney, that he had not been instructed that the rent was other than 650*l.*, and was surprised by the evidence given in support of the demise at 500*l.* There were also affidavits in support of the demise at 650*l.*

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R. V. Richards and *Chilton* now shewed cause. The short-hand writer's affidavit of the Judge's summing up cannot be noticed by the Court. [Lord *Denman* C. J. We cannot take the summing up from the short-hand writer's notes (*a*).] Judgment cannot be given for the defendant on sect. 24, because the variance affects "the merits of the case;" and, at any rate, the mis-statement might have "prejudiced" the plaintiff "in the conduct of the action." If the avowry had been on a rent of 500*l.*, he might have pleaded *riens in arriere*: the amount of rent due cannot be tried at this step of the cause upon affidavit. As for amending, that could be done only at *Nisi Prius*: this Court cannot now amend the record, and give judgment on it as amended (*b*). [*Talfourd* Serjt., for the defendant, suggested that the intention of the Court, in granting the rule *nisi*, must have been to enable the defendant to try the case anew with an amended avowry.] This rule must be

(a) See *Everett v. Youells*, 4 B. & Ad. 681.

(b) See *Guest v. Elwes*, *antè*, p. 118.

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discharged at any rate. [Lord *Denman* C. J. We will take it as if the rule had been that the defendant shall have a new trial, so that he may have an opportunity of amending his avowry; but we will not press the plaintiff's counsel to shew cause now against the rule so understood.] Even so understood, the rule must be discharged. No one of the grounds, upon which a new trial is ordinarily granted, exists. There is no surprise or misdirection; and there is no complaint that the verdict is against evidence. The defendant cannot say that he is prejudiced by the new rules of Court; for he might have amended before verdict. The real contest between the parties was, whether the rent was to be taken at 650*l.* or 500*l.* The defendant insisted upon having the verdict of the jury on that very issue.

Talfourd Serjt., *Whateley*, and *G. T. White*, contra. The justice of the case will be met by sending the parties to a new trial, with the avowry amended. If the defendant were driven to his action for the rent, at the rate of 500*l.* per annum, he would lose the security of the distress. The new rules prevent avowries for both sums (a). [It was then pointed out that the declaration was dated before the 1st day of *Easter* term, 1834.] That answers this part of the argument; but still, unless the new trial be granted, the defendant will fail as to all the rent by evidence which negatives his claim to a part only.

LORD DENMAN C. J. The application now made by the defendant was at first treated as founded on the new rules, and as having in view to obviate an incon-

(a) *Hil. 4 W. 4. General Rules and Regulations, 5. 5 B. & Ad. iii.*

venience which the defendant says they have occasioned. These rules confine the defendant to a single avowry; and the avowry here turns out to be inaccurate as to the amount of rent. The defendant wants to have a new trial, in order that he may plead differently. Suppose a slip to have been made in drawing an avowry, the Court, though it would act with great caution in such a case, might perhaps accede to an application of this kind. But here the whole defence rested throughout on the merits as disclosed in the avowry, and the defendant challenged the attention of the plaintiff to them. No case, therefore, is made out to induce us to give the defendant an opportunity of shaping his avowry differently. I think that the new rules have worked extremely well; and that no principle can be better than that which presumes a party to be cognisant of his own contracts. Surely a landlord must be aware of the amount of rent which is to be received by himself. In point of fact, moreover, the declaration here is dated before the first day of *Easter* term 1834; so that the defendant was really not precluded from putting a double avowry on the record.

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LITTLEDALE J. The defendant here was not precluded from avowing doubly. But suppose the declaration dated later than *Easter* term 1834. Before the statute of 4 *Ann.* c. 16. s. 4., there could be only one avowry. By the construction put upon that statute, a defendant in replevin was enabled to make several avowries. This, however, was found to produce expense and abuse; and the new rules forbid the allowance of avowries varying the amount of rent reserved. This may sometimes occasion an apparent hardship,

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where the actual rent turns out to be different from that which is alleged; but, in such a case, the defendant, at the trial, may apply to the Judge for leave to amend. Here the jury have decided that the rent is a smaller sum than that avowed for; upon which the plaintiff asks for a new trial, in order that he may go down with an amended avowry. Perhaps in some cases that might be allowed. But it appears here that the contest between the parties was, which was the rent, 650*l.* or 500*l.*; and the plaintiff, with full knowledge of the facts, chose to claim the higher sum, and did not apply to the Judge for leave to amend, which would have been granted, if the Judge had thought that a proper course. He is not now entitled to a new trial.

PATTESON J. The new rules do not apply to this case, the declaration bearing date before the first day of *Easter* term 1834. Before they came into operation, leave to make several avowries was granted as a matter of course: the defendant here might, therefore, have avowed doubly. But suppose this declaration had been dated after *Easter* term 1834: I think we could not, even then, have made the rule absolute. If the Courts, after determining that there should not be two avowries varying the amount of rent reserved, were to allow a party who has deliberately taken his chance for the higher rent to have a new trial upon his failing to prove that rent, we should do much better to allow two avowries in the first instance.

COLERIDGE J. This has become a case of considerable importance from the ground taken in the argument, the plaintiff saying that he did not quarrel with the direction

direction of the Judge, or the decision of the jury; but that he suffered by the effect of the new rules. That would bring the question to this, whether we are to abandon the new rules or maintain them. I think it best to meet the case on this ground, and to say that we will uphold the new rules, and will not replace parties in their former position, because the evidence defeats the statement made by one of them. As for the alleged inconvenience, that is met by the opportunity which is given for amendment. The object of the new rules was to diminish expense; and we should defeat that object by granting such applications.

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Rule discharged.

JOHN DAY *against* KING, FRERE, FINCH,
PURCHAS, and COTTON.

Wednesday,
June 8th.

TRESPASS. The declaration stated that the defendants, on &c., unlawfully issued and made a certain warrant, whereby, in default of such distress as therein mentioned being found, they commanded that there should be levied 8*l.* 4*s.*, and 7*s.* costs, by distress and sale of the goods of the plaintiff and one *Matthew*

An order of justices upon a party, requiring him to pay money to a person claiming it as member of a friendly society (under stat. 49 G. 3. c. 125. s. 3.), must find in

direct terms that the person applying is a member, that he is entitled to the money, and that the party against whom the application is made is, at the time, an officer of the society. An order of justices served upon *D.* does not find him to be an officer, by being directed to "*D.* steward of" &c.

Nor by reciting a complaint upon oath which states him to be so.

An order does not shew the applicant to be a member, and entitled to the money, by reciting that he made complaint upon oath, in which complaint he stated himself to be a member, and the money to be due.

Though the order afterwards direct the money "so due and owing as aforesaid" to be paid.

A warrant of distress, founded upon and reciting such order, and omitting to find as above, is bad; and, if goods be taken under such warrant, the justices are liable in trespass.

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Diver, together with certain other costs and charges; and that the defendants on the same day &c., under colour and pretence of the said warrant, with force &c., seized and took certain goods and chattels, to wit &c., of a large value, to wit &c., and kept &c., until the plaintiff, to regain the possession of the same, was forced to, and did, pay &c.

Plea, Not Guilty.

On the trial before Lord *Abinger* C. B., at the *Cambridge* Spring assizes, 1836, it appeared that the defendants, being magistrates of the town of *Cambridge*, on the fourth of *April* 1834, made the following order under stat. 49 G. 3. c. 125. (a): —

“Town of *Cambridge*, to wit. To *John Day* and *Matthew Diver*, stewards of the Friendly Society called

(a) Stat. 49 G. 3. c. 125. s. 3. enacts, “That if complaint shall be made to two such justices of the peace by any member of such societies, of relief having been refused to him by any such society, to which he shall be lawfully entitled according to the rules of the society to which he shall belong, it shall be lawful for the said two justices of the peace residing within the county,” &c. “or place, within which such society shall be held, and such justices are hereby required, upon complaint made by or on the behalf of the person aggrieved thereby, to summon the person, being an officer of the society against whom such complaint shall be made, and upon his or her appearance, or in default thereof, upon due proof upon oath of the service of such summons, such justices shall hear and determine the said complaint, and award such sum of money to be forthwith paid to the said complainant as shall appear to such justices to be due on such award as aforesaid, together with such a sum for costs, not exceeding the sum of 10s., as to such justices shall seem meet; and if the said sums so to be awarded, together with such costs, shall not be forthwith and in the presence of such justice or justices paid to such complainant, or to some person or persons there attending on the behalf of such complainant, then” the amount to be levied by distress, under the justices’ warrant, on the goods of the society, “with costs of distress &c., returning the overplus &c.; “and in default of such distress being found, then to be levied by distress and sale of the proper goods of the officer or officers of the said society so neglecting or refusing as aforesaid,” with costs as aforesaid, returning the overplus.

The

The Original Friendly Society, held at" &c., "in the town of Cambridge aforesaid.

"Whereas *John Stearn* of" &c., "in the said town, tailor, on the 18th day of *February* last, personally came before *Thomas Coe*, Esq., Mayor, and *Benjamin Cotton*, Esq., two of the justices assigned" &c., "and made an information and complaint upon oath before the said *T. C.* and *B. C.*, Esqrs., so being such justices (and which oath the said *T. C.* and *B. C.* did then and there administer to him the said *J. S.*), by which said information and complaint the said *J. S.*, on his oath aforesaid, deposed and said that he the said *J. S.* was a member of a certain friendly society called *The Original Friendly Society*, established in the parish of *St. Clement* in the said town, under and by virtue of the statutes in such" &c., "and, by the rules and regulations of the said friendly society, duly allowed and confirmed," &c., "every member of the said society, when sick and infirm, was entitled to be paid (during the continuance of such sickness and infirmity) the sum of 12s. weekly" (stating the rates of payment, viz. 12s. weekly for the first three months, 10s. for the second, 8s. for the third, &c.; and setting out other parts of the rules which are not material) "from and out of the funds of the said society by the stewards thereof: and that he the said *John Stearn* had, for the space of seven months then last past, been and then was very sick and infirm, and that he had made application to *John Day* and *Matthew Diver*, the stewards of the said society, for payment of 8l. 4s., being one week's relief of the said weekly sum of 12s., twelve weeks' relief of the said weekly sum of 10s., and four weeks' relief of the said weekly sum of 8s., due and payable to him by the said society during his said sickness and

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and infirmity, up to *Monday* the 10th day of *February* then instant, but had been refused the same, and thereupon prayed the judgment of two or more of his Majesty's justices of the peace" &c., "and that the said *John Day* and *Matthew Diver* might be summoned to answer to the said complaint according to the statute" &c.: "And whereas, on" &c., "at" &c., "the said *J. D.* and *M. D.*, pursuant to a summons issued for that purpose, appeared before us the undersigned, five of his Majesty's justices of the peace in and for the said town, assigned" &c., "and, the said *J. D.* and *M. D.* being then and there present, we the said justices (whose names are undersigned) did then and there proceed to hear and determine, and did hear and determine, the matter of the said complaint, and make such order thereupon as to us seemed just, according to the statute in such case" &c.: "(that is to say) we do hereby order and adjudge, by virtue of the said statute, that the said *J. D.* and *M. D.* do forthwith and in our presence pay to the said *John Stearn* the said sum of 8*l.* 4*s.*, so due and owing to him for such relief as aforesaid: and we do also award and adjudge *J. D.* and *M. D.* to pay *John Stearn* 7*s.* costs, according to the statute" &c. Dated *April* 4th, 1834. Signed and sealed by the five defendants.

The order having been served on *Day* and *Diver*, and the money not having been paid, the following warrant issued.

"Town of *Cambridge* to wit. To the constable of the parish" &c., "in the said town of *Cambridge*, and to all other constables in the said town.

"Whereas *John Stearn* of" &c. (reciting the foregoing order at length): "and whereas the said *J. D.*
and

and *M. D.* were called upon and required by us the said justices, whose names are undersigned, forthwith to pay the said sum of 8*l.* 4*s.*, and also the said sum of 7*s.* for costs, to the said *John Stearn* in pursuance of our said order, but they have refused and made default; these are therefore to command you to levy the said sum of 8*l.* 4*s.*, and also the said sum of 7*s.* for costs, by distress and sale of the monies, goods, chattels, securities, and effects, belonging to the said society," &c. (further order for sale in five days, unless the sum distrained for, with costs of the distress,) "shall be sooner paid, returning the overplus, if any, to the said society, or to one of the treasurers or trustees thereof: and, in default of such distress being found," (further order to levy the 8*l.* 4*s.*, and 7*s.* with charges of distress,) "by distress and sale of the proper goods of the said *J. D.* and *M. D.*," with an order for sale in five days, unless &c., as above, returning the overplus, if any, to *J. D.* and *M. D.* Dated 23d *May* 1834. Signed and sealed by the five defendants.

This warrant having been issued, the plaintiff caused a written notice to be served on the constable who had the execution of it, that there were no goods belonging to the society upon which a distress could be made; and the distress was thereupon made upon the plaintiff's goods, for which the action was brought.

Several objections were taken to the validity of the order and warrant. The Lord Chief Baron nonsuited the plaintiff, reserving leave to move to enter a verdict for 8*l.* 16*s.*, the sum which he was compelled to pay in order to regain possession of his goods. In *Easter* term 1835, *Kelly* obtained a rule accordingly.

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Storks Serjt., Starkie, and B. Andrews, now shewed cause (a). This order and warrant of distress are a justification under stat. 49 G. 3. c. 125. It was objected that the order does not find any sum to be due to *Stearn*; but it sufficiently appears that the sum is due, for *Day and Diver* are ordered "to pay to the said *John Stearn* the said sum of 8l. 4s., so due and owing to him for such relief as aforesaid." This substantially affirms the claim upon oath set forth in the complaint which is recited in the order. As to the objection that it does not appear that *Day and Diver* were officers of the society, that does appear by the direction of the order, which was duly served upon them, and upon which they were required by the defendants to pay the money before the warrant issued.

Kelly and Gunning contra. The order and warrant do not state directly or indirectly that *Stearn* was or ever had been a member of the society, but only the fact that he had, before other magistrates than those making the order, sworn himself to be so: nor that any thing was due to him; for the words "so due and owing to him for such relief as aforesaid" can refer to nothing except the fact of the claim having been made by him. And the want of a finding that the parties are officers is not cured by the direction of the order; for such direction is not a substantive finding; and it forms no part of the order; and in the warrant it does not appear at all. In 2 *Nolan's Poor Laws*, 224 (4th ed.) it is said, in speaking of an order of removal, that "it ought, in averring all essential facts, to use express and positive

(a) Many points were discussed in argument; but the report is confined to the point on which the Court decided.

words of adjudication; as, 'we adjudge;' or, 'it appears to us, &c.;' 'the parties are, &c.;' and it must either set them forth in the adjudication, or plainly refer to them when sufficiently stated in the complaint." And, further, that the same things must be adjudged in the order as should be stated in the complaint, "viz. 1st. That the parties are actually chargeable to the parish making the complaint, which is usually done by alleging the complaint to be true. 2d, That they are legally settled in the parish to which it is directed that they shall be conveyed." It is not sufficient, in the case of an order of removal, simply to recite the complaint that a pauper is chargeable, and then to speak of the pauper as so chargeable as aforesaid, without an express adjudication of the fact: [*Rex v. Bourn (a)*, *Malden v. Fletwick (b)*, *Rex v. Westwood (c)*, *Stallingborow v. Hazley (d)*, *Trobridge v. Weston (e)*, *Rex v. Pitts (g)*. (They were stopped by the Court.)

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Lord DENMAN C. J. The order and warrant are clearly bad. It is never adjudged that either *Day* or *Diver* is an officer of the society, which is necessary in order to render them liable to the distress, and without which they could have been guilty of no refusal; nor is *Stearn* found to be a member; nor is any sum found to be due. Where the magistrates have jurisdiction, they must dispose of the facts essential to their jurisdiction, by adjudicating; *Rex v. Harris (h)*. It is not enough merely to refer to the fact of the com-

(a) *Burr. S. C.* 39.(b) 2 *Salk.* 530.(c) 1 *Str.* 73.(d) 1 *Sess. Ca.* 142. 2d ed. pl. 131.(e) 2 *Salk.* 473.(g) 2 *Doug.* 661.(h) 7 *T. R.* 238.

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plaint being made, nor even to state their opinion as to such complaint (a) : the facts must be expressly found.

LITLEDALE J. I am of the same opinion. The order and warrant do not state what was proved before the justices. Supposing the parties to have been officers, and to have gone out of office a fortnight before the order made (b), which is quite consistent with the facts stated in the order and warrant, there was no more right of distress upon them, than upon any other member; they would have ceased to have any control over the funds.

PATTESON J. The magistrates are here the defendants in an action of trespass, and can protect themselves only by shewing a warrant good on the face of it. Assuming them to have jurisdiction under the particular facts of this case (as to which I give no opinion), they have not found that *Stearn* is a member, nor that money was due, nor that the parties distrained upon are or were officers, unless we assume that an order to pay is an implied finding : but the authorities cited, to which others might be added, are sufficient to shew that this assumption cannot be made. There must be a distinct finding. The other points, therefore, which it was intended to raise, cannot be decided.

WILLIAMS J. There has been a long and very able argument on many important points. But the facts

(a) *St. Mary Ottery v. St. Mary's Bristol, Ca. Sett. & Rem.* p. 23. 4th ed. pl. 32.

(b) The fact was so; and the effect of it was discussed in argument, independently of the objection on the face of the order.

must

must appear expressly on the order (a). I do not know of any distinction, as I have had other occasions of pointing out, between a conviction and an order. The facts raising the jurisdiction should be shewn. The act applies only to the case of an application by a member; and the justices nowhere find *Stearn* to be a member: that, of itself, is an unanswerable objection. Again, this is an order on a party who, on the face of the order, is not stated to be an officer at the time. Perhaps we may regret the conclusion at which we arrive: but the order and warrant furnish no defence.

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Rule absolute.

(a) *St. Peter Gloucester v. Bristol*, 2 Sess. Cas. 96. pl. 73. 2d ed.

HAWKES *against* RICHARD ORTON.

Thursday,
June 9th.

COVENANT. The declaration stated an indenture of May 5th, 1832, between defendant of the first part, *William Orton* of the second part, and plaintiff of the third part, whereby defendant and *William Orton* demised to plaintiff a messuage and premises from April 6th, 1833, for twenty-one years, and defendant covenanted with plaintiff that he "should and might have, occupy, and enjoy the said demised premises from the said 6th day of April for and during the term afore-

Where plaintiff declares on a covenant, in a lease by defendant, that plaintiff shall have, occupy, and enjoy the demised premises from a day named, for and during a certain term, and alleges as a breach that plaintiff on the day entered

upon the demised premises, and became possessed of them for the term, but that he was not able to occupy and enjoy the said premises in this, viz. that, plaintiff being so possessed, defendant entered into the premises and upon plaintiff's possession, and expelled and kept him out; to which defendant pleads that he did not enter and expel, &c.; such breach is not proved by evidence that plaintiff came to take possession, but was refused entrance by defendant, who continued occupying the premises, and never admitted him.

And it makes no difference that by a clause in the lease (stated in the declaration) it was agreed that, at a time previous to the above-named day, plaintiff should be at liberty to enter the arable lands fit for wheat, for the purpose of sowing, paying at a certain rate for such lands as should be sown; and that plaintiff had entered on a part of said arable lands, and sown before the day fixed for his taking possession of the premises generally, such entry being alleged in the declaration according to the fact.

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said;" and it was agreed that plaintiff should, from and after *October* 1st, 1832, be at liberty to enter upon the arable lands fit for wheat, for the purpose of sowing the same, paying to defendant (or *William Orton*) at the rate of half a year's rent and taxes for such lands as should be sown as aforesaid, and the plaintiff reserving to the defendant or *W. Orton* the like privilege, from and after *October* 1st next preceding the termination of that demise, they paying at the like rate: and it was further agreed that *William Orton* should have and retain the use of the barns, yards, and such of the outbuildings, being part of the demised premises, as might be necessary, till *Old May-day* then next, for the purpose of threshing, &c. Averment, that plaintiff, on *October* 1st, 1832, entered upon divers, viz. 200 acres of the arable lands fit for wheat, for the purpose of sowing, and did sow, &c.: and that afterwards, viz. *April* 6th, 1833, "by virtue of the demise, he the said plaintiff entered upon the demised premises except the said barns, yards," &c., "and became possessed thereof for the said term so to him thereof granted," &c.: and although &c. (the usual averment of performance by the plaintiff), "the said plaintiff in fact saith that he the said plaintiff hath not been able to and could not have, occupy, and enjoy the said demised premises from the said 6th day of *April*, for and during the term aforesaid, in this, to wit, that, he the said plaintiff being so possessed of the said demised premises, the said defendant afterwards, to wit on the 7th of *April* 1833, entered into the said demised premises and upon the possession of him the said plaintiff thereof, and expelled and removed him the said plaintiff from his possession thereof, and kept out him the said plaintiff

plaintiff from his possession thereof always from thence hitherto : by means of which said premises," &c.

Plea, " That the said defendant did not enter into the said demised premises and upon the possession of the said plaintiff thereof, nor expel or remove him the said plaintiff from his possession thereof, nor keep out him the said plaintiff from his possession thereof, in manner and form " &c. Conclusion to the country. There were other pleas, which it is not material to state.

On the trial before Lord Abinger C. B., at the *Cambridgeshire* Spring assizes, 1835, it appeared that the plaintiff, in the autumn of 1832, entered upon ninety-eight acres of the arable land, under the above lease, and sowed them with wheat; and that, on *April* 6th, 1833, he went to the farm, which still continued in the defendant's occupation, and stated that he was come to take possession according to the lease. Some further conversation followed; and, according to the representation on behalf of the plaintiff, he at that time demanded possession of the premises not yet given up to him, and the defendant refused it. The plaintiff never obtained possession. He ceased to occupy the ninety-eight acres, and the defendant reaped the wheat. The Lord Chief Baron was of opinion that the plaintiff had not clearly shewn any actual demand and refusal of possession, and that there ought to be a nonsuit. The plaintiff's counsel contended that there was a constructive eviction, inasmuch as the plaintiff must be taken (and was, in effect, admitted by the pleadings) to have entered upon the whole of the premises when he took possession of the ninety-eight acres, and the defendant, on *April* 6th, kept him out of the farm. The Lord Chief Baron then left it to the jury whether or not the plaintiff had gone to the farm on *April* 6th with a bonâ fide intent

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to take possession, and whether the defendant had seriously expressed, and shewn by his conduct, an intention that he should not have it. The jury found for the defendant. In the ensuing term a rule nisi was obtained for a new trial on the ground of misdirection. *The Court (a)* called upon

Storks Serjt. and *Kelly*, in support of the rule. It was not necessary, on these pleadings, to prove an expulsion de facto; and there was an entry by the plaintiff, and an expulsion of him, in point of law. There was a demise, and the lessee is prevented from having possession; and in *Pomfret v. Ricroft (b)* it is said that, if a man grants a watercourse and afterwards stops it, or demises a house and estovers, and afterwards destroys the wood, the party grieved shall have his remedy in covenant, "for these are *wilful* acts of the lessor or grantor, and it is a *misfeasance* in him to annul or avoid his own grant." And it is added, in Serjt. *Williams's* note (2) (c), "For this is equivalent to an *eviction* in other cases of a demise," and "covenant lies against the lessor on the implied covenant *in law* upon the word *demise*." — "But it is not necessary, in order to support this action that the lessee should be actually *evicted*. For the word *demise* implies a *power* to lease. Therefore where a man demises lands to which he has not any title, an action of covenant will lie against him, although the lessee never *entered*; for he is not bound to commit a trespass." And *Holder v. Taylor (d)* is cited. [*Patteson J.* If you choose to sue for what is not in the

(a) The argument was begun June 8th, and finished, and judgment given, June 9th.

(b) 1 *Saund.* 322.

(c) 1 *Wms. Saund.* 322 a.

(d) *Hob.* 12. (ed. 5th.)

ordinary legal sense an eviction, you should state the facts accordingly.] The declaration states that the plaintiff "hath not been able to, and could not, have, occupy, and enjoy the said demised premises." That alone would have been sufficient. But it goes on to say that the defendant entered and expelled &c. This is not literally true, as stated; but the plaintiff, by the lease, was to have possession of the ninety-eight acres at one time, and of the remaining premises at another: he entered upon the ninety-eight acres, and was possessed of them in fact: then, when the time came for entering upon the other part, possession was refused. That was an expulsion from the whole. And, although there was not in fact an entry upon all the premises, an entry upon all is alleged in the declaration, and admitted by the plea. This was not adverted to by the Lord Chief Baron at the trial. There being such an admission, it becomes unnecessary to consider whether the mere sealing of the lease did not vest the possession on *April* 6th 1833; particularly as between lessor and lessee. When the defendant, upon that day, continued to occupy the premises, using them as his own, and refusing to give them up, he dispossessed the plaintiff. If the plaintiff had actually gone upon the premises during that day, though only for an hour, and left them to bring his goods, there could have been no doubt that the conduct here proved would have been an expulsion and breach of covenant. That case does not, in point of law, differ from this. Occupying the house which belongs to another, against his will, is a keeping of him out, and an eviction; it is not necessary that there should be a breach of the peace, nor does the declaration here allege it. If the defendant had sued the plaintiff for rent during the time when he was kept out, he could have

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had no defence but that he was evicted. A demand of possession was not necessary: it was sufficient that the defendant did that which made it useless for the plaintiff to attempt occupying the premises as his own. The breach of covenant, therefore, as laid in the declaration, is borne out by the subsequent pleading and by the facts proved. The words of the declaration, as to the entry, are, that afterwards, to wit &c., "by virtue of the said demise, he, the said plaintiff, entered upon the said demised premises," "and became possessed thereof *for the said term* so to him thereof granted." [Lord Denman C. J. "For," in that sentence, does not mean "during;" that would be nonsense. The possession mentioned there must refer to the particular time of the entry. *Littledale J.* cited, as to the dispossession, 9 *Vin. Abr.* 85. *Disseisin* (C.) pl. 7.]

B. Andrews and Byles, contra. The defendant's covenant might have been broken either by refusing possession or by turning the plaintiff out when he had entered. The plaintiff has chosen to allege the latter breach; and the facts do not support the allegation. No right of entry before *April* 6th 1833 is shewn, except for a special purpose, namely to sow the arable land with wheat, and upon payment of a specific rent for such land as should be so used. And the allegations as to the plaintiff's entry are, that on *October* 1st he entered upon divers to wit 200 acres of the arable lands demised for the purpose of sowing; and that, on *April* 6th 1833, he "*entered upon the said demised premises*" (except the barns, &c.); no entry, as upon the whole, being stated till then, and no continuance of possession alleged. He had no *interesse termini* in the whole till *April* 6th. Even if he had in fact entered

tered and had possession on that day, the defendant's possession was not necessarily an eviction. In *Com. Dig. Seisin* (F. 2.) it is said that "an act, which does not oust him who has the freehold, though it be tortious, will not be a disseisin; as, if a commoner" &c. "So, if *A.* enters upon the possession of *B.* but does not expel him, it is no disseisin." At all events, if the lessee has never entered, it is a question of fact whether or not the lessor's continuance in possession was an eviction: as, for instance, if the lessee went to *America* before the time fixed for taking possession. (The argument, which followed, on the facts of the present case, is omitted.) The passage which has been cited, from *Vin. Abr. Disseisin* (C.) pl. 7., is, that, "if a man that has right to enter into lands, in coming towards the land is disturbed from entering, this is a disseisin." The text, as given in *Com. Dig. Seisin* (F. 1.) is, "So, if a man disturbs the entry of him who has right, into land, it will be a disseisin." [*Patteson J.* 1 *Roll. Abr.* 659., l. 15. is cited in *Comyns*; *Viner* refers to *Bro. Abr. Disseisor et Disseisin*, 42. (a). The placita differ, but the same authority, 26 *Assis.* 17., is referred to in both.] The plaintiff here did not come to enter. The declaration does not allege merely that the plaintiff could not have, occupy, and enjoy the premises, but it adds "in this, to wit," that the defendant entered upon his possession and expelled him. That ties him down to proof of the particular breach so alleged; *Harris v. Mantle* (b). The plea does not admit the plaintiff's entry before the alleged expulsion, for there is no positive allegation of an entry before that time. There is

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(a) The placitum referred to in *Bro. Abr.* is pl. 41. The placitum in *Lib. Ass.* is pl. 18., and corresponds with the translation in *Viner*.

(b) 9 *T. R.* 307.

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no statement in the declaration which accurately fixes the period of the plaintiff's entry; the date, *April 6th 1833*, being given under a *videlicet*.

LORD DENMAN C. J. The plaintiff here declares in covenant, and states, as a breach, that the defendant entered upon his possession, and expelled and removed him. This is a perfectly intelligible breach; and other modes of breaking the covenant might have been stated with equal clearness if the plaintiff had thought proper to allege them. There is no evidence of the breach as stated. It is not necessary to say in what mode the facts of this case might have been alleged so as to make out a breach of covenant; the statement here is shewn by the evidence to be untrue. I think that there was no expulsion in law or in fact, and that the Lord Chief Baron even went out of his way in putting the case to the jury. He did so, however, indulgently to the plaintiff; and the jury have found for the defendant. The plaintiff has no right to ask for a new trial.

LITLEDAL J. It has been properly observed that the plaintiff, by alleging that the defendant broke his covenant "in this," has confined himself to proof of the particular breach stated after those words. That breach is, that, the plaintiff being possessed, the defendant entered into the premises and upon the plaintiff's possession, and expelled him from the possession. Upon that allegation issue is joined. Then as to the plaintiff's case. It is said that he entered. Clearly he did not enter in fact: but it is said there was an entry in law. Now it is true that, in an action by lessor against lessee for rent, the defendant cannot protect himself by simply traversing his own entry, because he had a
 right

right to enter, by the lease. But here we are not considering the right in point of law, but the fact of entry, which the declaration brings into question. That fact was not proved. Whether, if the lessee went formally to take possession, and the landlord said he should not, that would be a disseisin according to the authorities, it is not necessary to say. And the cases in which a party may consider himself disseised or not at his election are different from this. Here an expulsion, which is a putting out, did not take place: a party who comes to claim, but has never entered, cannot be expelled. I think that it would be a sufficient answer to an action of debt for rent, to plead that the defendant was ready to enter upon the premises, but the plaintiff obstructed and would not allow him; though I never saw such a plea, and it is not necessary at present to say whether it would be good or not.

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PARTESON J. The Lord Chief Baron might properly have directed a nonsuit. I agree that, according to the authority cited for the plaintiff, where a party demises, and then by his misfeasance annuls the grant, he is liable in an action. But, where the facts are as in this case, the action must be, not for expelling, but for not letting in. How far the keeping out may be considered a disseisin, or ground for an action of ejectment, it is not necessary to say. This is an action of covenant; and, in stating the breach, the facts should have been alleged as they really were. The questions which the Lord Chief Baron left to the jury, on the supposition that this Court might not have decided for the defendant on the point of law, were rightly put: and, if I had been on the jury, I should have decided

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as they did. Quâcunque viâ datâ, the plaintiff ought not to recover.

WILLIAMS J. I am of the same opinion on both points. I cannot agree in the view of my brother *Storks*, who argues that there is no difference, for the purpose of this action, between an expelling and a keeping out.

Rule discharged.

Friday,
June 10th.

The KING against NICHOLETTs.

The Court will not order a town clerk, against whom a criminal information has been filed for misconduct in his office, relating to an election of councillors of the borough, to produce the election papers which are in his official custody, in order that they may be impounded, to be forthcoming at the trial as evidence against him; though it is suggested that the six months, during which the clerk is required to keep the papers (by stat. 5 & 6 G. 4. c. 76. s. 35.), will expire before the trial.

A CRIMINAL information had been filed against the defendant, who was town clerk of *Bridport*, for misconduct in his office, in a matter relating to an election of councillors of the borough. On this day,

Sir *W. W. Follett*, on the part of the prosecution, applied to the Court to order the voting papers in the defendant's official custody, which had been used in the election, to be impounded till after the trial of the criminal information. He stated that the defendant was not bound by the act to keep the voting papers more than six months from the time of the election (*a*), which time would expire before the trial; and that, unless the Court made the order, these papers, the production of which at the trial would be most important, would probably not be forthcoming.

Lord DENMAN C. J. The Court never interferes in this manner to compel a defendant to produce evidence

(a) Stat. 5 & 6 W. 4. c. 76. s. 35.

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against himself. It will be matter of strong observation against the defendant, if the voting papers are not kept, and produced when called for at the trial.

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LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule refused.

TYLER *against* BENNETT.

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ACTION on the case. The declaration was for disturbing the plaintiff in the use of a well, to the water of which the declaration stated that he was entitled by reason of his occupation of a dwelling house, for the more convenient enjoyment thereof. Pleas. 1. Not Guilty. 2. That the plaintiff was not entitled to the use of the well, in manner &c. Issues thereon. On the trial at the last assizes for *Glamorganshire*, before *Coleridge J.*, a verdict was found for the plaintiff, on both issues, with 1s. damages. The learned judge certified, under stat. 43 *Eliz.* ch. 6. s. 2., that the damages were under 40s. In last *Easter* term, *Evans* moved for a rule to shew cause why the Master should not tax the plaintiff his full costs. As to the nature of the right claimed in the cause, he cited *Fentiman v. Smith (a)*. A rule having been granted,

A right to take water from a well by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land. Therefore, where nominal damages had been recovered in an action for disturbing such a right (on an issue traversing that the plaintiff was entitled to the use of the well in manner &c.), and the Judge at Nisi Prius certified that the damages were under 40s., it was held that the plaintiff was entitled to his full costs, under stat. 43 *Eliz.* c. 6. s. 2.

Chilton and *E. V. Williams* now shewed cause. The question is, whether the declaration discloses a "title or interest of lands," so as to bring the case within the ex-

(a) 4 *East*, 107.

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ception of 43 *Eliz. c. 6. s. 2.* A right to draw water from a well is not such a title or interest. Disturbance in it is like an obstruction of ancient lights, the right to which is not a title or interest in land. *Edmonson v. Edmonson* (a) may be cited on the other side. That was an action on the case, for an injury done to the plaintiff's right of common by digging turves. There the certificate was held to deprive the plaintiff of costs; but it may be said that, upon the record, as it stood in that case, it was doubtful whether the right to dig turves came into question; and that, as may be inferred from the judgment, if the right had clearly come in question, it would have been held to be within the exception. But the right to dig turves is not an easement; it is a profit à prendre. It is not to be taken that all right to draw water is denied by the pleas, but only the right as claimed, modo et formâ; and under the new rules it may be made a question, whether an accidental obstruction of a right of this kind is to be defended under a denial of the right claimed at all times, or under the general issue; and the policy of the law would be defeated, if a certificate were to be without effect in the case of such an interest as this. Suppose an action brought for an obstruction of a footway occasioned by accidental circumstances; could not the Judge certify to deprive the plaintiff of costs, if he thought the action frivolous? Here, in like manner, it must be assumed, from the certificate granted, that the action was frivolous: in other words, that the Judge thought this action not necessary to assert the right to the use of the water. The right, as stated, might be

(a) 8 *East*, 294.

inconsistent

inconsistent with the defendant's right to make an alteration in the well, whereby unavoidable disturbance might have been occasioned; and the pleas may be taken only to deny the right to such an extent. [*Patteson* J. It must be taken that the right is correctly stated in the declaration, and it is found for the plaintiff.] At all events the declaration does not state a right to any interest in land: if it did, the rule perhaps could not be resisted.

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Sir *W. W. Follett* and *Evans*, contra, were stopped by the Court.

LORD DENMAN C. J. There is no doubt that a right to take water is an interest in land; and the case is therefore within the exception.

LITLEDALE J. concurred.

PATTESON J. In *Edmonson v. Edmonson* (a) it was not doubted that, if the right had come in question, it would have been an interest in land, and within the exception.

WILLIAMS J. concurred.

Rule absolute.

(a) 8 *East*, 294.

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The KING *against* The Commissioners of
Customs and Another.

The Court will not grant a mandamus to compel the commissioners of customs to deliver up goods placed rightfully in their custody to secure the duty, on a suggestion that the full amount of the duty has been since tendered or paid.

Per *Little-dale J.*, a mandamus cannot be granted against a party acting merely as officer of the crown.

JOHN JERVIS had obtained a rule, in this term, calling upon his Majesty's Commissioners of Customs, and the Collector of Customs in *London*, to shew cause why a mandamus should not issue, commanding them to deliver to *William George Legge* certain tobacco, lately shipped in the *Sarah*, and wrecked near *Torbay*, the duties due in that behalf having been paid. From the affidavit in support of the rule, it appeared that the tobacco was in the custody of the officers of the customs to secure the duty; that *Legge*, being owner of the tobacco, had proceeded to pass an entry in the usual way, and had tendered to the officers appointed to receive the duties (together with the charge for rent, and the fee) a sum which, as he contended, under the circumstances stated in the affidavit, was the whole duty payable on the tobacco; that the tender was refused, and the tobacco detained; and that *Legge* had paid the amount tendered into the hands of the officers of his Majesty's Treasury at the Custom House in *London*.

Sir *John Campbell*, Attorney-General, (with whom was *T. F. Ellis*) now shewed cause. The applicant proposes to raise the question, whether the tobacco is liable only to the lower duty, as derelict or wreck, under stat. 3 & 4 *W. 4. c. 52. s. 50*. But the question cannot be raised in this way; for no mandamus lies, even supposing the amount tendered and paid to be all that is due.

due. The officers are not called upon to perform a duty, but, according to the case of the applicant, to abstain from a wrongful act. If they are not entitled to retain the goods, they are wrong-doers, and the proper remedy is by some civil action, as, for instance, trover or replevin, which last remedy applies wherever goods are unjustly taken or detained : 2 *Selw. N. P. Replevin* I. p. 1184. (ed. 8.), and note (2) there. (He was then stopped by the Court.)

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John Jervis, contra. Trover, at any rate, is not maintainable : the goods are in the hands of the Crown ; and the Court will not put the applicant to a petition of right. [*Littledale J.* Will a mandamus lie to the officer of the king ?] This is the simplest way of raising the question ; and no objection to it can reasonably be made on behalf of the Crown. [*Patteson J.* We should object to issuing the writ, if not warranted.] This is not a misfeasance, so as to be the subject of an action between party and party, but a nonfeasance by a public officer. It is not disputed that the goods were rightfully in the officers' custody till tender was made. There is no positive tort ; neither will the law raise an assumpsit. It might have been otherwise, if the taking had been unlawful, as in the instances given by Mr. *Selwyn*, in the passage referred to. [*Lord Denman C. J.* What do you say the nonfeasance is ?] The not delivering up, or giving an order for the purpose to the particular officer having the actual custody. [The Attorney-General referred to *Whitelegg v. Richards* (a).]

(a) 3 B. & B. 188. ; and in error, 2 B. & C. 45.

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LORD DENMAN C. J. Either the officer was justified in what he did or he was not. If he was, there is no grievance : if he was not justified, mandamus is not the proper remedy.

LITLEDALE J. I think we cannot here take into consideration the argument that there is no other remedy. The goods are in the hands of the officers of the Crown : a mandamus to them in this case would be like a mandamus to the Crown, which we cannot grant.

PATTESON J. Mr. *Jervis* says that, as he has tendered and paid all that is due, he is entitled to have the goods. His client's course is then to ask for the necessary document for the purpose of having the goods delivered up ; and, if that be refused, to seek his remedy for such refusal ; but that is not the application now made.

WILLIAMS J. concurred.

Rule discharged (a).

(a) See *Rex v. Payn*, *Hilary T.* 1837.

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SHEARWOOD *against* HAY and Another.Friday,
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IN the first of these causes the plaintiff declared in assumpsit for medicines furnished and work done as an apothecary. Plea, non assumpsit. The cause was tried at *Lincoln*, *March* 9th, 1836, before the deputy under-sheriff. The plaintiff proved his claim, but did not produce his certificate from the Apothecaries' Company, or shew that he was in practice as an apothecary before *August* 5th, 1815; and he was nonsuited, as not bringing himself within stat. 55 G. 3. c. 194. s. 21.

In an action brought since the Rules of Hil. 4 W. 4. for medicines furnished, and work done, by plaintiff, as an apothecary, the plaintiff is liable to be nonsuited under stat. 55 G. 3. c. 194. s. 21., if he fail to prove his certificate, or that he was in practice before *August* 5th, 1815, although the defendant has pleaded only non assumpsit.

In the second cause the declaration was in debt for work and labour as a surgeon and apothecary, for medicines, &c., and for money had and received. Pleas, except as to 5s. 9d., first, that defendant never was indebted; secondly, a set-off. And as to the 5s. 9d., a tender. Issues were joined on the first two pleas, and the 5s. 9d. was taken out of court. The cause was tried before the under-sheriff of *Middlesex*, *April* 18th, 1836, and the plaintiff obtained a verdict for 3*l.* 0*s.* 7*d.*, liberty being reserved to the defendant to move to reduce the verdict by the amount of 2*l.* 2*s.*, which the plaintiff claimed as an apothecary, he not having produced his certificate, or proved that he had been in practice before *August* 5th, 1815.

Or although the defendant has pleaded (indebt), as to part, that he never was indebted, and, as to the residue, a tender.

In *Easter* term last, rules were moved for in the two causes; in the first, for a new trial, and in the second to reduce the damages. The ground of motion in

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Shearwood v. Hay was, that, since the rules of *Hil. 4 W. 4.*, the objection under the statute ought to have been specially pleaded. The two cases now came on together.

Whitehurst, against the rule in *Shearwood v. Hay*. It has already been decided by *Patteson J.*, in the Bail Court, in *Morgan v. Ruddock (a)*, that the present objection need not be pleaded. The proof omitted here is required as a condition of the plaintiff's recovering, by stat. 55 G. 3. c. 194. s. 21., which enacts "That no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial, that he was in practice as an apothecary prior to or on the said 5th day of *August* 1815, or that he has obtained a certificate to practise as an apothecary, from the said Master, Wardens and Society of Apothecaries as aforesaid." This Court could not, by its rules, prevent the operation of the statute. The act 3 & 4 W. 4. c. 42. s. 1., under which the rules of *Hil. 4 W. 4.* were made, expressly provides that no such rule shall take away the power of pleading the general issue and giving the special matter in evidence, in any case where it exists by any act of parliament. Stat. 55 G. 3. c. 194. is an act, not merely for the protection of defendants, but for the public benefit. Besides, this is not one of the cases in which a special plea is required by the new rules. The contract relied upon is an implied promise to pay: it is for the plaintiff to shew such facts as may warrant the implication of a promise to pay him in the character in which he sues.

(a) *Harr. & W.* 505. *S. C. 4 Dowd. P. C.* 311.

The plea of non assumpsit puts those facts in issue. Thus, in the rules, *Hil. 4 W. A., Pleading in particular actions*, I. *Assumpsit* 1 (a), it is said that the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied in law. And that, in actions against carriers and other bailees, for not delivering or not keeping goods safe, &c., this plea "will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach." And other instances are given, bearing in like manner on the present question. Here no express promise is relied upon: the plaintiff's qualification as an apothecary is one of the "facts" from which the alleged contract is to be "implied in law." *Edmunds v. Harris* (b) may seem to contradict this reasoning; but the authority of that case has been much questioned (c). A great hardship would be thrown upon defendants in cases like this, if the new rules obliged them to prove, and to plead, the want of qualification, which qualification ought to be part of the plaintiff's case. In *Moore v. Boulcott* (d) the non-delivery of a bill by an attorney was pleaded in answer to an action for his work and labour; but there no question arose as to the effect of the new rules upon stat. 2 G. 2. c. 23. s. 23.; and the words of that section are,

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(a) 5 B. & Ad. vii.

(b) 2 A. & E. 414.

(c) See *Hayselden v. Staff*, antè, 159, where *Edmunds v. Harris* is decided not to be a binding authority. See also the cases cited, antè, 158—162; some of which were mentioned in the present argument.

(d) 1 New Ca. 323.

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that no attorney "shall commence or maintain any action" for his fees, &c., till one month after delivery of his bill; not, as in the Apothecaries' Act, that he shall be precluded from recovering unless he give certain proof on the trial.

Humfrey contra. The new rules, when once in force, have the authority of an act of parliament, by stat. 3 & 4 W. 4. c. 42. s. 1. In *Graham v. Partridge* (a) the Court of Exchequer held the statute of set-off, 2 G. 2. c. 22. s. 13., to be in effect repealed by the rule which requires a set-off to be specially pleaded. [*Whitehurst*. That was on the ground that the statute 2 G. 2. c. 22. s. 13. was not a statute introducing a "power of pleading the general issue," within the meaning of stat. 3 & 4 W. 4. c. 42. s. 1., and therefore that the rule had not "the effect of depriving any person" of that power.] The only effect of the Apothecaries' Act, 55 G. 3. c. 194. s. 21., is, that the plaintiff shall be called upon to prove his qualification, provided there be anything in the cause that raises the question; but not where, by the state of the record, that fact is not material to the issue. Where, for instance, a tender is pleaded, that is equivalent to an admission that the plaintiff was qualified as an apothecary. Suppose it could be shewn that the defendant had expressly admitted the qualification. [*Patteson* J. That, as against him would, (if available), be evidence on the trial to satisfy the statute.]

Humfrey then shewed cause in *Wills v. Langridge*, relying on the same arguments as in the former case.

(a) 1 M. & W. 395. S. C. Tyr. & G. 754.

Waddington contra. A defendant pleading the general issue as to part of the demand, and a tender as to the residue, admits only that the sum tendered is due. That was laid down in *Simpson v. Routh* (a), where, in an action for money had and received, for the overplus of a sum levied by distress, this Court held that the plaintiff was properly nonsuited for want of a demand, though part of the sum claimed had been tendered. In *Seaton v. Benedict* (b), which was an action of assumpsit for goods sold and delivered, it was held that a tender or payment into Court recognised the defendant's liability only to the extent of the sum tendered or paid in, and that he might dispute it as to items not covered by that sum. A similar rule is laid down in *Long v. Greville* (c), as to payment of money into Court, with the exception that, if money is paid in upon a special contract, that contract is admitted as alleged. In the present case it might be that the money was paid in for goods furnished after the plaintiff had become qualified. [*Patteson J.* In *Lipscombe v. Holmes* (d), which was an action for work and labour as a surgeon, Lord *Ellenborough* held that a payment into Court admitted the plaintiff's right to sue in that character.] The cases in Banc contradict that decision. Then, supposing the tender not to weigh on behalf of the defendant, the case is clearly distinguishable from that of an action by an attorney who has not delivered his bill. A defendant sued by an apothecary cannot know whether he is qualified or not: a client must know whether or not he has received a bill. And the positive enactment of stat.

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(a) 2 B. & C. 682.

(b) 5 Bing. 28.

(c) 3 B. & C. 10. See *Meager v. Smith*, 4 B. & Ad. 673. *Harrison v. Douglas*, 3 A. & E. 396.

(d) 2 Camp. 441.

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55 G. 3. c. 194. s. 21. makes the proof of qualification at the trial a condition precedent to the apothecary's recovery of his charges.

Lord DENMAN C. J. (after reading the clause last referred to.) The statute requires that, before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified. The under-sheriff, in the first of the cases before us, held that the qualification was a part of the plaintiff's title to recover, which the statute made it imperative upon him to prove, and that, in the absence of such proof, he must be nonsuited. I think that the ruling was right. There is a difference between cases in which proof is made necessary by a statute on principles of public policy, and where it is required merely for the security of individuals in transactions between themselves. And a defendant cannot know that a plaintiff is not qualified as an apothecary; it would be great injustice to call upon him to plead and prove the want of qualification, especially where he is told by a statute that, unless the plaintiff proves himself qualified, he cannot succeed. The case, therefore, is quite different from that of an attorney suing without having delivered a bill. There the fact is within the knowledge of the defendant; and he ought, if he has no other defence, to give notice of the defect insisted upon to the plaintiff, who may then deliver his bill and bring another action. And the enactment which governs that case is differently framed from sect. 21 of stat. 55 G. 3. c. 194., which makes proof of qualification on the trial a condition precedent to the plaintiff's recovery. The tender in the second case has not the effect supposed by the plaintiff.

It

It is too much to say that an offer of payment, so generally made, admits the plaintiff to be an apothecary entitled under the act to recover charges in that character. The defendant may have been willing to get rid of the action by a tender without knowing whether the plaintiff was a qualified apothecary or not. The new rules do not apply. The contract is not avoided here; but the statute gives a protection to the defendant, and prevents the plaintiff from recovering, if he fail, on the trial, to invest himself with a certain character. The rules, therefore, must be, in the first case, discharged; in the second, absolute.

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LITLEDALE J. By the rules, *Hil. 4. W. 4., Pleadings in particular actions*, tit. *Assumpsit*, I. 3. (a), matters "which shew the transaction to be either void or voidable in point of law" must be specially pleaded. If, for example, such a case as *Forster v. Taylor* (b) were to occur again, there is no doubt that the defence must be pleaded. Here, the contract is not avoided by the general policy of the law, or defeated with reference to the particular dealing between the parties; but there is an enactment which affects the character of one of the parties personally, and excludes him from suing. This is not matter to be pleaded; for, in the nature of things, the defendant cannot be expected to know whether the plaintiff fills the character in question or not. The matters of defence arising upon statute, which are noticed in the clause of the new rules just cited, and in which special pleas are required, all refer to something which affects the nature of the contract itself. As to the

(a) 5 B. & Ad. viii.

(b) 5 B. & Ad. 887.

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tender, I am of opinion that that does not admit the character in which the plaintiff sues, but that, upon the plea of non assumpsit, he may dispute the character as if no tender had taken place.

PATTESON J. These motions bring under review an opinion which I delivered after much consideration in *Morgan v. Ruddock* (a). I still adhere to that opinion. The words of stat. 55 G. 3. c. 194. s. 21., "unless such apothecary shall prove on the trial, that he was in practice" &c., cannot be got over. As to the second of the present cases, *Reid v. Dickons* (b) is a material authority; because there it was admitted that there was only one contract, under which the plaintiff claimed; and the action was for a residue of money owing on that one contract. In that case 110*l.* was paid into Court; and the defendant pleaded the general issue and the statute of limitations. *Parke J.* says there, "The payment of money into Court admits the contract as alleged, and a right to recover 110*l.*; but beyond that sum, every defence is open."

WILLIAMS J. I am of opinion that the first rule must be discharged, and the second made absolute; and I found myself on the 21st section of stat. 55 G. 3. c. 194. It would require something that should exclude all doubt, to satisfy me that the new rules of Court did away with that enactment.

First rule discharged.

Second rule absolute.

(a) *Harr. & W.* 505. *S. C.* 4 *Dowl. P. C.* 311.

(b) 5 *B. & Ad.* 499.

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The KING *against* The Churchwardens of St. *Friday,*
JAMES, WESTMINSTER. *June 10th.*

A RULE nisi was obtained in this term (*May 24th*), for a mandamus, calling upon the then churchwardens (*a*) of *St. James, Westminster*, "to cause a notice to be given in the parish church and chapels of the parish of *St. James, Westminster*, for convening a meeting of the inhabitants of the said parish for the purpose of electing churchwardens and sidesmen for the said parish for the year ensuing, in like manner as, and according to the laws and statutes under which, the churchwardens and sidesmen for the parish of *St. Martin in the Fields*, in the said county, are now chosen." The material statements in support of the rule were as follows.

Henry Rice, formerly vestry-clerk of *St. James*, deposed, on information and belief, "That the churchwardens and sidesmen of the said parish of *St. James*

By statute, 1 Jac. 2. c. 22. (1685), the parish of *St. James Westminster* was created, by dividing a district from the parish of *St. Martin*; and it was enacted, that the inhabitants of *St. James's* "shall be from time to time subject to the laws and statutes now in force, or hereafter to be made for the choice of churchwardens," &c. "and such other like parish officers, and other parochial duties within the said pa-

rish, in like manner as the inhabitants of the said parish of *St. Martin's* are or might be subject and liable unto." *St. Martin's* had been governed by a select vestry; and provision was made for continuing such a vestry in *St. James's*.

Before 1685 the practice in *St. Martin's* on the election of the two churchwardens had been, that the vestry chose them by scoring certain prepared lists (the greatest number of scores carrying the election); but, by usage, the junior churchwarden of the preceding year was re-elected of course. It did not appear how or when this practice originated. The power of the select vestry to choose the churchwardens was often disputed in *St. Martin's* after 1685; and, for the last two years, the elections by them were discontinued, and the officers chosen according to stat. 58 G. 3. c. 69. No alteration was made in *St. James's*.

Held, that the mode of election practised in 1685 was one of the laws then in force, by which, under stat. 1 Jac. 2. c. 22., the parish of *St. James* was to be governed. And that the abandonment of the custom by *St. Martin's* did not oblige *St. James's* to discontinue it also.

St. James's had adopted Sir John Hobhouse's act. Agreed, that this made no difference.

(a) The churchwardens having gone out of office before cause was shewn, it was ordered, on the motion of the Attorney-General, that the succeeding churchwardens should be at liberty to shew cause.

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were always chosen, after the year 1685, by the select vestrymen appointed for the said parish of *St. James*, under and pursuant to the statute of 1 *James 2. c. 22. (a)*; and that the mode of proceeding, on the part of the said select vestrymen, after the said year 1685, was to meet together in the vestry room of the said parish church, on the *Thursday* before *Easter* in every year, and 'score,' as it was called, first for churchwardens, and next for four sidesmen, which was done by a paper, with the names of eligible persons for each office written thereon, being passed round by the select vestrymen present, each in their turn making a mark; and the names which were afterwards found to have most scores or marks against them were chosen churchwardens; and the four names with most scores or marks against them were chosen sidesmen; and the junior or last named churchwarden of the first and of every succeeding year it was always the custom to continue the senior churchwarden of the next year; and such continuing churchwarden, with the person so scored for to be associated with him as aforesaid, was afterwards, at another meeting of the select vestrymen holden on the *Tuesday* in *Easter* week, confirmed by the select vestrymen there present, as the churchwardens and sidesmen of the parish for the year ensuing" (b). That, as the deponent

(a) "For erecting a new parish, to be called the parish of *St. James* within the liberty of *Westminster*." The act, sect. 1., marks out a precinct by certain bounds and limits, and enacts that it shall be a distinct parish, divided and exempt from the parish of *St. Martin*.

(b) The sections of stat. 1 *Jac. 2. c. 22.* chiefly bearing upon the present case were, —

Sect. 9., which enacts, "That the inhabitants of the said parish of *St. James* shall be from time to time subject to the laws and statutes now in force, or hereafter to be made, for the choice of churchwardens, over-

seers

deponent was informed, &c., such mode of proceeding was adopted in the parish of *St. James* in conformity with the mode of proceeding adopted and used for the choice of churchwardens and sidesmen by the select vestry which, in 1685, regulated the affairs of *St. Martin in the Fields*, the last mentioned vestry being at that time a select vestry granted, at the instance of certain

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seers of the poor, scavengers, surveyors of the highways, constables, and such other like parish officers, and other parochial duties within the said parish, in like manner as the inhabitants of the said parish of *St. Martin's* are or might be subject and liable unto (except where it shall be otherwise hereby appointed)."

Sect. 10. appointed the first churchwardens by name, to hold office till *Easter* 1686, and enacted, that "they and their successors, churchwardens of the said parish of *St. James*, shall have and receive such and the like church duties and perquisites as the churchwardens of the said parish of *St. Martin* do, may, might, or ought to receive, and shall be accountable for the same, and all other money that shall come to them as churchwardens, in such manner as churchwardens of other parishes within the city and liberties of *Westminster* are or ought to be."

Sect. 11. provides and enacts, "That all such vestrymen of the said parish of *St. Martin* as are inhabitants within the precincts aforesaid, and all such others as are now constituted to be supervisors and commissioners for the said church of *St. James* by the said Lord Bishop of *London*, shall be vestrymen of the said parish of *St. James*; and they, together with the said rector of the said parish, or any six or more of them, shall and are hereby authorized, at their first or second meeting after the end of this present session of parliament, to elect so many additional vestrymen, inhabitants and householders within the said parish, as shall make the number of the whole, with the rector and churchwardens for the time being, to be four and thirty persons; and the said vestrymen, or any six or more of them (whereof the rector for the time being, or his assistant or clerk, by his appointment, and one of the churchwardens to be two), shall and may have and exercise the like power and authority for ordering and regulating the affairs of the said parish of *St. James*, as the vestrymen of the said parish of *St. Martin* now have and exercise in reference to the said parish of *St. Martin*; and upon the death or other voidance of any such vestryman, they, or any six or more of them, shall and may elect a fit person, inhabitant and householder in the said parish, to supply the same."

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of the inhabitants of *St. Martin's*, by an instrument under the hand of the diocesan or ordinary, dated *June 28th, 1662*.

That the inhabitants of *St. Martin's* have often, since 1685, resisted and disputed the power of the select vestry to regulate its affairs or appoint churchwardens, and such power has been the subject of much litigation; and that, for the last two years, in consequence of the result of a late litigation, which was determined against the vestry, they have ceased to claim or exercise such power; and the choice of churchwardens and sidesmen for *St. Martin's* has been by the inhabitants at large; and the course has been that, upon notices given (as described in the affidavit), the inhabitants of *St. Martin's*, being rate-payers, have, at meetings holden pursuant to such notices, elected churchwardens and sidesmen by voting in the manner prescribed by stat. 58 G. 3. c. 69., "for the regulation of parish vestries."

That, in *June 1832*, the churchwardens of *St. James, Westminster*, after the requisite proceedings, gave notice in the *London Gazette* that that parish had adopted Sir *John Hobhouse's* act, 1 & 2 W. 4. c. 60., whereupon the select vestry appointed under 1 Jac. 2. c. 22. ceased to regulate the parish affairs. The churchwardens named in the rule were applied to by the vestry-clerk to give notice, in the parish church, of a meeting of the inhabitants of the parish, to elect churchwardens for the year ensuing, but refused to give such notice, unless ordered by this Court to do so.

The affidavits in opposition to the rule set out a minute of vestry, dated *April 1st, 1686*, shewing the mode in which the first election of churchwardens took place after the passing of stat. 1 Jac. 2. c. 22., namely, by
scoring.

scoring. The minute referred, in several parts, to "the custom of the parish" relative to the proceedings described (a). Copies were added of the vestry minutes of *April* 20th, 1835, when the late churchwardens were chosen by scoring, which choice was confirmed in vestry, 21st *April* 1835; also the minutes of *March* 31st, 1836, when the present churchwardens were chosen by scoring, which choice was confirmed in vestry on the 5th of *April* following, and the churchwardens sworn in on the 26th of *May*. And it was stated by the vestry clerk of *St. James's*, "That, although, by several acts of parliament relating to this parish, passed subsequently to the said act, 1 *Jac.* 2., the appointment of overseers of the poor and other officers has been fixed to be made at a certain time, and in a particular manner,

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(a) The minute was as follows: — "At a vestry the 1st day of *April* 1686. Present, Dr. *Thomas Tennison*, rector, eleven other members, and Mr. *John Haines*, and Mr. *William Nott*, churchwardens. On this day, according to the custom of the parish of *St. Martin's*, churchwardens and sidesmen were nominated for this parish for the year ensuing, and notice was sent to have them attend at the vestry on *Tuesday* in *Easter* week, to be then confirmed in their places; and at the same time the like notice was sent to several persons, out of which overseers of the poor were to be elected also for the year ensuing. The proceeding therein was as followeth: that is to say — The names of four persons were written in a paper, out of which two were by strokes of the gentlemen of the vestry noted to be churchwardens; and the first of those four written in the said paper was, according to the custom of *St. Martin's*, the junior churchwarden of the last year; and the greater number of strokes were for Mr. *William Nott* and Mr. *William Hargrove*, who were the two first in the said paper named to be churchwardens. There was also in the like manner the names of six persons written in a paper, out of which four sidesmen were to be nominated, whereof the two first named were the two juniors of the last year, who were chosen of course, according to the custom aforesaid; and the two eldest next them were also nominated, which were Mr. *James Fearn* and Mr. *Joseph Parsons*; and the rule in this case is, that the sidesmen are supplied out of those that have been overseers or fined for that office, to be named according to their seniorities." *Nott* was the second of the two persons named in stat. 1 *Jac.* 2. c. 22. s. 10. as churchwardens up to *Easter* 1686.

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such appointments have always been expressly declared, by the several acts relating thereto, to be vested in the select vestry of the said parish, and that no public meeting of the inhabitants of the said parish has ever, to the best of deponent's knowledge and belief, been called for the election of churchwardens, overseers, or any other officers, excepting that the said parish having adopted an act," &c. (*Sir John Hobhouse's act*), "a public meeting of the parishioners is always called in the month of *May* in every year, to elect vestrymen and auditors of accounts, according to the provisions of the said act."

Sir J. Campbell, Attorney-General, and *J. Jervis*, now shewed cause (a). The question is, whether the churchwardens of *St. James's* parish are to be elected by the rate-payers at large, or by those who now constitute the vestry under *Sir John Hobhouse's act* (b). The ninth section of stat. 1 *Jac. 2. c. 22.* might leave some doubt on the subject; but sect. 11 explains the former clause, and is decisive. It enacts that the vestrymen of *St. James's* shall have and exercise "the like power and authority" for regulating the affairs of that

(a) Before Lord Denman C. J., *Littledale, Patteson, and Williams Js.*

(b) Stat. 1 & 2 *W. 4. c. 60. s. 27.* enacts, "That from and after the adoption of this act in any parish, the vestry shall exercise the powers and privileges held by any vestry now existing in such parish, and the authority of such vestry may be pleaded before any justice or justices of the peace, or in any court of law," &c.; "and all parish officers or boards shall account to them in like manner as they have accounted to the said vestry: provided always, that nothing in this act shall be deemed, construed, or taken to repeal, alter, or invalidate any local act for the government of any parish by vestries, or for the management of the poor by any board of directors and guardians, or for the due provision for divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than is by this act expressly enacted regarding the election of vestrymen and auditors of accounts."

parish,

parish, "as the vestrymen of the said parish of *St. Martin* now have and exercise in reference to the said parish of *St. Martin*," that is, according to the custom at that time established in both parishes. If it be clear that the usage in question, as to the choice of churchwardens, existed, *de facto*, when the act 1 Jac. 2. c. 22. passed, the act must be taken as adopting that usage, although it may not be conformable to the common law course of election. This was the mode in which the *Covent Garden Market Act*, 53 G. 3. c. lxxi. (local and personal, public), was construed in *The Duke of Bedford v. Emmett (a)*. It does not appear that, when the statute of *James* passed, any one supposed the then existing mode of election to be illegal. Whatever construction may be given to sect. 9, it cannot be supposed that every statute which might affect the parochial affairs of *St. Martin's* was to have a similar operation in *St. James's*. The adoption of Sir *John Hobhouse's* act by the parish of *St. James* does not alter the present question, there being, in sect. 27, a saving of local vestry acts, except as to elections.

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Sir *W. W. Follett*, contra. The affidavits state that the power assumed by the select vestry in *St. Martin's* had been a matter of much contest before the alteration in the mode of electing officers there. The language of stat. 1 Jac. 2. c. 22. shews that changes in the government of the parishes were contemplated. Sect. 9 enacts, that the parish of *St. James* shall be "from time to time" subject to the laws and statutes "now in force, or hereafter to be made," for the choice of officers, in like manner as the inhabitants of *St.*

(a) 3 B. & Ald. 366.

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Martin's "are or might be subject and liable unto."

Sect. 11 does not apply to the election of parish officers, which is already disposed of by sect. 9. The enactment in sect. 9, referring to the "laws" in force for the choice of officers, cannot contemplate a mode of election which the Court, if it came before them, would not hold legal. In the absence of any regulation by statute or established custom, the churchwardens ought to be elected by the inhabitants; and nothing has been pointed out here, which, at the time when stat. 1 Jac. 2. c. 22. passed, could have legally taken away the common law right of election from the inhabitants of *St. Martin's*, and vested it in a select body. [Lord Denman C. J. There may be some little fallacy in the use of the words "legal," or "illegal," as applied to the custom in question. You mean to speak of it, not as against morals or policy, but as not entirely warranted by law.] That is so. Either the words "laws and statutes," in the statute of *James*, contemplate local laws and usages, and then they can only refer to legal ones; or they allude to the general law of the land, and then the common law mode of election must be meant. It may be admitted that the adoption of Sir *John Hobhouse's* act does not affect the question.

Cur. adv. vult.

LORD DENMAN C. J. on a subsequent day of the term (*June* 13th), delivered the judgment of the Court.

We are clearly of opinion that the act of parliament intended to direct the election of churchwardens to take place in the new parish of *St. James*, carved out of *St. Martin's*, according to the prevailing course of proceeding in the last named parish. The language is not entirely

entirely free from doubt; but, considering that a certain custom had long prevailed without question, the phrase, "subject to the laws and statutes now in force," must be taken as a description of the existing practice. If the intention had been that, in case of any change in the constitution of *St. Martin's* vestry, a similar change should immediately take place in *St. James's*, some reference must have been had to the mode in which the law was to undergo alteration. Such an enactment would have been superfluous, if the change were effected by act of parliament, by which the effect of it on *St. James's* parish might have been the subject of express regulation; and, if a new state of things in *St. James's* had been intended to follow every new state of things in *St. Martin's*, produced by an opinion that the ancient vestry had not a legal origin, it cannot be doubted that the act would have prescribed some means of determining upon its legality, as the verdict of a jury, or the sentence of a Court. The answer may be that no such doubt ever crossed the mind of the legislature in *James the Second's* time: but, if that be correct, it seems to follow that the custom, as it existed in the old parish, was established in the new, without any reference to its origin.

The rule must therefore be discharged.

Rule discharged.

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CLAY *against* BOWLER.

A person, having been in prison twelve months in execution on a judgment for a debt not exceeding 20*l.* exclusive of costs, was disordered in mind, and unable to transact business. His wife gave notice to the plaintiff that she should apply to the Court for his discharge under stat. 48 G. 3. c. 123.; and she applied accordingly.

Notices had been given by the plaintiff for the purpose of bringing up the defendant under the compulsory clause, 32 G. 2. c. 28. s. 16.: but no account had been obtained from him.

Held, that the Court might act upon the wife's application, and discharge the prisoner.

THE defendant having been in prison more than twelve successive calendar months in execution on a judgment obtained against him in the King's Court of Record of his Honor of *Peveler*, holden at *Lenton*, *Nottinghamshire*, for a debt not exceeding 20*l.*, exclusive of costs, his wife gave notice to the plaintiff that she should apply to this Court for his discharge, pursuant to stat. 48 G. 3. c. 123., and the rule, *Hil. 2 W. 4. I. s. 90. (a)*.

E. V. Williams, in this term (*May 25th*), moved accordingly, and stated that the material question would be, whether the wife's application could be treated as that of the husband for the purpose of the act. On this point he relied upon the affidavit of a surgeon, who deposed that he had attended the defendant for upwards of twelve months last past; that, from repeated attacks of paralysis, the defendant then was, and had been for eight months last past, of unsound mind, totally incapable of making an affidavit, or of understanding the nature thereof, and incapacitated from doing any kind of business, or expressing himself in any way to be understood. A rule nisi was granted.

Whitehurst now shewed cause. Notices were given on behalf of the plaintiff, after the defendant had been

(a) 3 B. & Ad. 388.

three months in custody, for the purpose of bringing him up under the compulsory clause (s. 16.) of stat. 32 G. 2. c. 28 (a); but no discovery of his estate and effects could be obtained. The merits, therefore, are against the application; though it cannot be contended, after some late decisions, that the proceeding referred to is any bar to the discharge under stat. 48 G. 3. c. 123. But that statute, sect. 1., entitles the person or persons in execution to be discharged "upon his, her, or their application" to one of the superior courts. This cannot be called the defendant's application. He is of unsound mind, and the notice is not given in his name, nor does it even profess to be given by the wife on his behalf. This application is not necessary to prevent his lying in prison, for he might be relieved under sect. 73 of the Insolvent Debtors' Act, 7 G. 4. c. 57, which provides for the discharge of prisoners unsound in mind. And, where a party is discharged under that clause, the creditors have remedies against his property, which cannot be enforced where the discharge is under stat. 48 G. 3. c. 123.; as against copyhold, which is not liable to an elegit, but may be conveyed for the benefit of creditors under stat. 7 G. 4. c. 57. There is no reason, therefore, for giving an extended construction to stat. 48 G. 3. c. 123.

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E. V. Williams contra. If the prisoner is brought within the conditions of stat. 48 G. 3. c. 123., the Court cannot look to the circumstances, for there is no discretionary power; *Wood v. Kelmerdine* (b), *Stacey v.*

(a) The notices appeared to have been given about seven months before the present application.

(b) 2 Y. & J. 10.

1896.

 CLAY
 against
 BOWLER.

Fieldsend (a). The unsuccessful proceeding under the compulsory clause, 32 G. 2. c. 28. s. 16., is admitted to be no bar to an application under the subsequent act, and was held to be none in *Ex parte Rossiter* (b) and *Ex parte White* (c). The question, therefore, is simply whether a person of unsound mind may take advantage of stat. 48 G. 3. c. 123. It would be strange if such a person were placed in a worse situation than a sane person who obstinately remains in prison twelve months. The Court will construe the act liberally, and consider this application by the wife as the party's own. A lunatic must of necessity appear before the Court by some other person. An action brought by an attorney for him would be considered as his action.

LORD DENMAN C.J. This is an application on behalf of a lunatic prisoner by the party most nearly connected with him. Under the circumstances, and in a case affecting liberty, it would be violent to say that the application is not his act. The rule may, therefore, be made absolute.

LITTTLEDALE J. The object of this statute is that, for a debt within a certain amount, a party shall not be kept in prison more than twelve months, though he may have chosen to lie in prison during that time. Here the party cannot, himself, apply for his discharge. Perhaps, in strictness, there should be a committee, and he should make the application; but we cannot suppose that, to discharge the prisoner from a debt of this amount, such a process should be gone through;

(a) 1 Dowl. P. C. 700.

(b) 13 Price, 186.

(c) 1 Dowl. P. C. 66.

and,

and, the application here being made by a person so near as the wife, I think the rule may be granted.

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PATTESON and WILLIAMS Js. concurred.

Rule absolute (a).

(a) If a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day, if the feoffor die before the day, the heir may pay or tender it at the day; but if a stranger, who hath not any interest, will tender it, the feoffee is not bound to receive it. *Litt. s. 334.* "But if the heir be an idiot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases." *Co. Litt. 206 b.*

GAMBRELL *against* Earl FALMOUTH and
HOUGHTON.

Friday,
June 10th.

Same *against* Earl FALMOUTH and AUSTIN.

TALFOURD Serjt. had obtained a rule to shew cause why the Master should not review his taxation in both the above actions, and why the costs of the defendant, the Earl of *Falmouth*, in both actions should not be set off against the plaintiff's damages and costs in the first. The circumstances were reported by the Master (*Goodrich*) for the information of the Court, and were, in substance, these.

The plaintiff *Gambrell* had been tenant of Lord *Falmouth* of a house, &c. Two distresses for rent were at

Where two defendants in trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon all the issues, the other upon one only, each defendant is entitled to his separate costs of the issues on which he has succeeded, and an aliquot part

of the joint costs, unless the Master is satisfied that, by reason of special circumstances, less ought to be allowed to either.

The defendants in such a case having appeared by separate attorneys and counsel, but the attorneys being members of the same firm, and the briefs and evidence substantially the same, the Master taxed the costs as if the parties had appeared by the same attorney. Admitted, that the taxation, in that respect, could not be disturbed.

A landlord sued in trespass for an irregular distress, and obtaining judgment against the plaintiff, may recover double costs under stat. 11 G. 2. c. 19. s. 21, though he has pleaded specially.

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—
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 against
 Earl
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different periods made on the plaintiff's effects, the first by the defendant *Houghton*, the earl's agent, the other by the defendant *Austin*, his lordship's bailiff; and for those distresses the above two actions were brought, the earl, as landlord, being made a defendant in each.

The declaration and other pleadings were in substance the same in each action. The declaration contained three counts: 1. For distraining for more than was due; 2. For taking plaintiff's tools whilst in actual use; 3. For distraining the tools when there were other goods sufficient to satisfy the rent.

Pleas (the same by each defendant): 1. Not guilty to the whole; 2. To the first count, that the whole sum distrained for was in arrear; 3. To the second count, that plaintiff was not using the tools; 4. To the last count, that there were not other goods of sufficient value. Whereupon issues were joined.

Both causes were tried before Lord *Denman* C. J. at the *Berkshire* Summer assizes, 1835, when verdicts were found thus. In the first action, for the Earl on the general issue, but for the plaintiff on the special pleas; and for the plaintiff with 10*l.* damages and 40*s.* costs, against the defendant *Houghton* upon the whole of the record. In the second action a verdict for both defendants on all the pleas (a).

The defence in each action was conducted by Messrs. *Adlington*, *Gregory*, *Faulkner*, and *Follett*, the attorneys for Lord *Falmouth*. In the first action the Earl appeared and pleaded by *George Faulkner* his attorney, and the defendant *Houghton* by *Robert Bryley Follett* his attorney.

On the taxation, it appeared that separate briefs had been prepared and separate counsel employed by the

(a) See *Gambrell v. The Earl of Falmouth and Austin*, 4 A. & E. 73.

defendants

defendants in each case; and the reason assigned by the Earl's attorney was, that his Lordship knew nothing of the acts of the other defendants until the actions were about to be brought, and that therefore it was deemed advisable to keep his defence distinct from that of his agents; and upon this ground it was contended that the Earl was entitled to the whole costs of his defence in the first action, as having defended by a separate attorney; a point which the Master overruled, the attorneys for the respective defendants being partners, and the briefs and evidence for each defendant being substantially the same. It was next insisted, on the part of the Earl, that he was at all events entitled to an aliquot portion of the costs of the whole defence; and *Griffith v. Jones* (Exchequer) (a) was cited as an express authority; but the Master overruled this suggestion also.

1. Because the principle contended for had never been acted upon in the King's Bench. 2. Because, if such principle had been acted upon, yet it would not apply to this case, the Earl having failed on his special pleas.

The Master, therefore, allowed the earl in the first action his reasonable costs with reference to the merits of his own defence only, according to the practice hitherto observed in the King's Bench where acquitted defendants sever in pleading; which practice was recognised in *Holroyd v. Breare* (b). And in the second action, in which both defendants were successful, he apportioned the costs of each defendant according to the same practice, allowing for separate pleas, briefs, counsel, &c., but adhering as far as circumstances would permit to the case of *Nanny v. Kenrick* (c), in

(a) 4 Dowl. P. C. 159.

(b) 4 B. & Ald. 43, 700.

(c) 2 Dowl. P. C. 334.

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which it was holden that, where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge.

Double costs were also claimed for the Earl in the first action, and for the Earl and the defendant *Austin* in the second action, under stat. 11 G. 2. c. 19. s. 21.: but the Master refused to allow them, thinking that, as the defendants, instead of confining themselves to the general issue, as they were empowered to do by the statute, had thought fit to plead specially as well, they were not entitled to such double costs.

And, with regard to setting off the Earl's costs in both actions against the plaintiff's damages and costs in the first action, the Master expressed his opinion that the Earl was not entitled to do so, the actions being not between the same parties; observing at the same time that the plaintiff's attorney's lien would in that case be affected (a), and consequently that the Earl, if he persisted in claiming such set off, must apply to the Court.

The Master added the following explanation of the mode of allowing costs in K. B. in cases like the present.

By stat. 8 & 9 W. 3. c. 11. s. 1., it is enacted that, in all actions of trespass against several defendants, one or more of whom shall be acquitted by verdict, such person or persons shall recover his costs in like manner as if a verdict had been given against the plaintiff, and acquitted all the defendants, unless the Judge certify as there stated. And by stat. 3 & 4 W. 4. c. 42. s. 32. it is enacted that, where several persons shall be made

(a) See *Lees v. Reffitt*, 3 A. & E. 707.

defendants

defendants in any personal action, and any one or more of them shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the Judge shall certify, &c. Where, therefore, all the defendants appear and plead by the same attorney, the taxing officers of K. B. have hitherto allowed thus. If they plead jointly, and the defence of one be the defence of all, nominal costs of 40s. only to the acquitted defendant, to cover his proportion of the ordinary costs of the defence, such as instructions to defend, entering appearance, &c. But, where the acquitted defendant severs in pleading, so much of the pleadings and briefs as would be applicable to his particular case, any witness or witnesses called solely on his behalf, a fair proportion of counsels' fees, &c. And, where the acquitted defendant has appeared and pleaded by a different attorney, the officers have invariably given him all his reasonable costs as in ordinary cases.

But in *Griffiths v. Kynaston* (a) the Court of Exchequer were of opinion that the successful defendant, though pleading the same plea and by the same attorney, was entitled to an aliquot portion of the whole costs of the defence. The same rule was also laid down by that Court in *Starving v. Cousins* (b) and in *Griffith v. Jones* (c); but in deciding the latter case the Court seems to have considered that the old rule of allowing 40s. only in these cases was inflexible, a supposition which, as regarded the King's Bench, was incorrect.

The Master therefore stated the points for consideration here to be: " 1. Whether, with reference to the

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(a) 2 Tyrwh. 757.

(b) 1 Gale, 159.

(c) 4 Dowl. P. C. 159.

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above decisions in the Exchequer, the practice in K. B., and the fact of Lord *Falmouth's* having failed on his special pleas in the first action, the costs in these actions have, as regards principal and single costs, been rightly taxed? 2. Whether, as the defendants pleaded specially, in addition to the general issue, Lord *Falmouth* and *Austin* are entitled to double costs? and, if so, whether the Earl's double costs should not be confined to the second action, his Lordship, as above observed, having failed as to part in the first action? 3. Whether, under all the circumstances, Lord *Falmouth* is entitled to set off his costs as prayed by the rule."

Knowles, in last *Easter* term, shewed cause (a). First, the Master has done rightly in allowing the Earl only a reasonable portion of the costs apportioned between him and the other defendants, and not an aliquot part. He has exercised a discretion which he was entitled to use, since stat. 3 & 4 W. 4. c. 42. s. 32. *Starving v. Cousins* (b) and *Griffith v. Jones* (c), where the Court of Exchequer held an aliquot part to be the proper allowance, are contrary to the practice here; and in those cases the defendants who obtained such costs had succeeded on all the issues; here the verdict, in one of the causes, was against the Earl upon one issue. *Holroyd v. Breare* (d) shews the principle adopted in such cases by this Court, and is applicable here. Then it is objected that the costs are allowed only as if the parties had appeared by the same attorney. [*Talfourd* Serjt.,

(a) May 7th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(b) 1 *Gale*, 159. S. C. (as *Starling v. Cozens*), 2 Cro. M. & R. 445.

(c) 4 *Dowl. P. C.* 159.

(d) 4 B. & Ald. 43, 700.

for

for the defendants, waived this point.] As to the allowance of double costs. At all events, the earl cannot claim them in the first action, under stat. 11 G. 2. c. 19. s. 21. (a), because the judgment is not wholly against the plaintiff. And, as to each action, a defendant is entitled to double costs only where he has, according to sect. 21., pleaded the general issue and given the special matter in evidence. The double costs are a penalty, not to be enforced unless the defendant has brought himself strictly within the enactment. And it is not reasonable that he should recover them, where he has increased expense by incumbering the record with special pleas. [Patteson J. What necessary connection is there between the two parts of the section? Suppose it appeared that the defendant did not take any goods at all, and no special matter were given in evidence, do you say that the defendant then would not be entitled to double costs?] He would, if he brought himself within the enactment in other respects. [Patteson J. Then you admit that the two branches of the section are distinct from each other. The latter clause, in mentioning "such action," cannot refer exclusively to actions in which the proceeding shall have been that before de-

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(a) Stat. 11 G. 2. c. 19. s. 21. enacts that, "In all actions of trespass or upon the case to be brought against any person or persons entitled to rents or services of any kind, his, her or their bailiff or receiver, or other person or persons, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon; it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence; any law or usage to the contrary notwithstanding; and in case the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her or their action, or have judgment against him, her or them, the defendant or defendants shall recover double costs of suit."

scribed,

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scribed, because it speaks of the plaintiff discontinuing such action. Lord *Denman* C. J. The object seems to be, that the landlord shall not be under the necessity of pleading specially the defences arising from the relation of landlord and tenant. And the words in the latter clause of the section are, that the defendant shall have double costs if the defendant become nonsuit, &c., "in such action;" not if he fail in any particular course of pleading.] The words "such action," in the latter clause of the section, refer to the "actions" twice mentioned in the earlier part, in which the defendant adopts the mode of pleading there spoken of. [*Patteson* J. referred to *Johnson v. Larson* (a).] That was an action of replevin; and the question arose on a different section of the statute. Lastly, as to setting off the costs, the rule, *Hil. 2 W. 4. I. s. 93. (b)* directs that no set-off of costs shall be allowed to the prejudice of the attorney's lien in the suit against which the set-off is sought. *Cowell v. Betteley* (c) and *Domett v. Helyer* (d) shew the strictness with which that rule is enforced.

Talfourd, Serjt., contra. As to the first point, it is said that the Master has given reasonable costs, according to the discretion vested in him. But that is a discretion to be exercised on the principle recognised by the Court, which principle is matter of positive regulation. The convenient rule is, that the whole amount of costs due to the several defendants should be ascertained, and each allowed his proportion, without reference to the question of merits. Something was found against Lord *Falmouth* in this case; but the pleas

(a) 2 *Bing.* 341.(b) 3 *B. & Ad.* 388.(c) 10 *Bing.* 432.(d) 2 *Dowl. P. C.* 540.

found

found for him went to the whole cause of action. As to stat. 11 G. 2. c. 19. s. 21., that section gives the defendant two privileges: first, the right to plead the general issue and give the special matter in evidence; secondly, double costs in the cases pointed out. There is nothing that makes the exercise of the former privilege a condition of the latter. The mention of discontinuing, in the second branch of the section, has been pointed out from the Bench. With respect to the set off, it is not desired on the part of the defendants to interfere with the attorney's lien.

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LORD DENMAN C. J. No point remains as to the set off, it being agreed that that must be subject to the attorney's lien. On the subject of double costs I entertain no doubt. The Earl might waive his privilege of pleading the general issue and giving the special matter in evidence; but he still retained his other rights under the statute as landlord. I see no reason for the special pleas pleaded by him in this case: but the act distinctly provides that, in the actions there described, if the plaintiff shall have judgment against him, the defendant shall recover double costs of suit. We have no power to say, in such a case as this, that the landlord is not entitled to them. As to the apportionment of costs, we will take time to consider.

LITLEDAY J. Under stat. 11 G. 2. c. 19. s. 21. a defendant may or may not use the privilege given as to pleading; but the words in the latter part of the section, "in case the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her or their action, or have judgment against him, her or them,"
refer

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refer to the actions "of trespass or upon the case" mentioned in the former part of the section. Here, though in one action the plaintiff succeeded on some of the pleas, he would take nothing even on that, by the general judgment. The first part of stat. 11 G. 2. c. 19. s. 21. is a general and comprehensive clause, and comprehends "all actions" of trespass or case brought for the causes there specified; the words "such action," in the latter clause, refer merely to the particular case where, in one of the actions before mentioned, a contingency there contemplated occurs. I have not the slightest doubt upon this point.

PATTESON J. The early part of sect. 21 of this statute is merely descriptive of a certain class of actions; then a privilege is given to defendants in those actions, as to pleading; and, lastly, it is provided, that if the plaintiff or plaintiffs "in such action shall become non-suit, discontinue his, her or their action, or have judgment against him," &c., the defendant shall have double costs. This is an action of the class spoken of in the beginning of the section, "relating" to a "distress or seizure;" and the plaintiff has had judgment against him in it. It is no matter what his pleas have been. The clause giving double costs is quite unconnected with the enactment as to pleading.

COLERIDGE J. concurred.

As to the remaining question,

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. We disposed of all the points in this case
at

at the time of the argument, except the question, where one of several defendants succeeds in an action, by what rule the taxation of his costs is to be regulated. We have considered the matter, and think ourselves bound by the rule laid down by Mr. Baron *Bayley* in *Griffiths v. Kynaston (a)*, and afterwards confirmed in *Griffith v. Jones (b)*, viz., that the successful defendant is to be allowed all his separate costs, and *primâ facie* an aliquot part of the joint costs, unless the Master is satisfied that some smaller proportion should be allowed by reason of any other special circumstances. The rule for reviewing the taxation will therefore be absolute.

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Rule absolute.

(a) 2 *Tyrrish*. 760.(b) 2 *Cr. M. & R.* 333.

JONES *against* EVAN RICHARD and Others.

Friday,
June 10th.

REPLEVIN for sheep and lambs. The defendants made cognisance, as bailiffs of *Elizabeth Davies*, that the Rev. *Hugh Smith* was seised in fee of a messuage, farm, lands, and premises called *Blaenmerin*, with the appurtenances, situate &c., and that he and all

In replevin for sheep, the defendants made cognisance, as bailiffs of the tenant of a messuage and lands called *B.*, that the said tenant, and all

those whose estate &c., occupiers of *B.*, had the sole and exclusive right of pasture and feeding of sheep on *L.* the locus in quo, as to the said messuage, &c., appertaining; and that the plaintiff's sheep were damage-feasant. By another cognisance they alleged a right of common over *L.* as appurtenant to *B.* The pleas in bar denied the above rights, and alleged that the plaintiff had right of common over *L.*, as appurtenant to his messuage, &c., called *T.* Issues were joined as to the several rights.

At the trial it appeared that *L.* was a mountain sheep-walk, upon which no act of ownership had been exercised but the feeding of sheep. The defendants abandoned their alleged right of common; and, upon the issue as to the exclusive pasturage, the jury (having had their attention called to the difference between a mere privilege and the right of soil) found a verdict for the defendants, and "that *L.* was part of the farm of *B.*;" finding also, as to the remaining issue, that the plaintiff had no right of common in respect of *T.*

On motion to enter a verdict for the plaintiff, or for a new trial, or judgment for the plaintiff non obstante veredicto on the issue as to the exclusive right of pasture, the Court held that, upon the evidence and finding, the cognisance could not be sustained; and they granted a new trial.

those

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those whose estate he then had of and in the said messuage, &c., for the time being, from time whereof &c., had had used and enjoyed; and had been used and accustomed &c., and of right ought &c., and still of right ought to have, use, and enjoy for himself and themselves, and his and their tenants and farmers, occupiers of the said messuage, farm, lands, and premises called *Blaenmerin*, the sole and exclusive right of pasture and feeding of sheep and lambs in, upon, over, and throughout a certain piece of land, situate in the county aforesaid, called *Llechweddcârregdio*, as to the said messuage, farm, &c., called *Blaenmerin*, belonging and appertaining: that *Smith* being so seised, before the times when &c., to wit &c., demised the said messuage, farm, &c., to *E. Davies*, to hold from year to year, by virtue of which demise she, before the time when &c., entered, and was and is possessed of *Blaenmerin* with the appurtenances for the term granted: and, because the sheep and lambs were damage-feasant upon *Llechweddcârregdio*, so that *E. Davies* could not have or enjoy her said right of pasture and feeding there in so ample a manner &c., the defendants, as bailiffs &c., well acknowledge &c. Verification. There was another cognisance by which *E. Davies*, as lessee of *Smith*, claimed common of pasture on *Llechweddcârregdio*, for all her sheep and lambs levant and couchant on *Blaenmerin*, as belonging and appertaining to *Blaenmerin*; but this was abandoned at the trial.

To the first mentioned cognisance (the second on the record), there were two pleas in bar. 1. Traversing the right of *Smith* in *Llechweddcârregdio*, as pleaded in the second cognisance, and concluding to the country. 2. That plaintiff, before and at the time when &c., was the
lawful

lawful occupier of a messuage, farm, lands, and premises called *Tycoch*, with the appurtenances, situate &c., and that plaintiff and the occupiers for the time being of the said farm, &c., have respectively for and during the thirty years next before the commencement of this suit, and before the said time when &c., had, used, and actually enjoyed of right without interruption, and claimed of right, common of pasture in and upon the said place called *Llechwedddcarregdio*, for all his and their sheep and lambs levant and couchant in and upon the said messuage, farm, and lands with the appurtenances, every year at all times of the year, as to the said messuage, farm, and lands with the appurtenances belonging and appertaining: wherefore plaintiff, before and at the time when &c., put the sheep and lambs, &c., being his own sheep and lambs, levant and couchant &c., into the said place in which &c., to feed and depasture, and which said sheep and lambs were lawfully there feeding &c., until defendants of their own wrong &c.: verification. The replication traversed the thirty years' enjoyment of right of common as pleaded, concluding to the country.

On the trial before *Williams J.* at the Spring assizes for *Cardiganshire*, 1835, it appeared that the *Blaenmerin* property consisted of a house, some enclosed land, and a tract of unenclosed mountain land forming sheep walks. *Elizabeth Davies*, the lessee of *Blaenmerin*, claimed to have a right in the *Llechwedddcarregdio*, as one of these sheep-walks. The plaintiff endeavoured to prove a right of common appurtenant to *Tycoch*, on the *Llechwedddcarregdio* sheep-walk; and the defendants gave evidence of an exclusive pasturing (but not any

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other exercise of ownership) on the same tract (a). But, with respect to this tract, one of the defendants' witnesses, who had lived with an occupier of *Blaenmerin*, stated that during that time the occupier claimed several hundred acres of mountain (including the tract in question) as belonging to *Blaenmerin*, and that he "claimed the mountain land as he claimed the rest." Language to a similar effect was used by other witnesses.

The circumstances of the trial were further stated as follows in the judgment of the Court upon the after-mentioned motion. "With respect to the second avowry, the learned Judge early in the cause intimated an opinion that the evidence, on each side, tended to prove that the '*sheepwalk*' in question *belonged* to one or other of the contending tenements, and was a part of it 'as much as the house or buildings' belonging to either, according to the language of the witnesses. The case, however, was permitted to go on, to give the defendant an opportunity of having a verdict entered for him on the second avowry, in case the jury should find *some* right for him, and the Court should think (contrary to the opinion of the Judge at the trial) that the evidence might support that avowry. The evidence was accordingly left to the jury, which was a special one, with remarks upon the distinction between the right to the *soil itself*, and any right of common, or right of pasturage, *in respect of it*; and the jury were requested to say whether, upon the evidence, they were of opinion that the place in question, the *Llechwedd-carregdio*, belonged to *Blaenmerin*, as an integral part

(a) Some evidence was given by the defendants, to shew that the right of soil was in the Crown.

of it, like the house and buildings themselves, or whether they thought the defendant had a right of common or pasturage in respect of it. The jury found for the defendants, — ‘ that the *Llechweddcarrregdio* was part of the farm of *Blaenmerin*, — and no right of common for *Tycoch*.’ ”

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R. V. Richards, in *Easter* term 1835, moved for a rule to show cause why the verdict should not be set aside, and a verdict entered for the plaintiff, on the ground that the defendants had failed in establishing the right under which they made cognizance, according to their pleading; or why there should not be a new trial, if the jury were to be considered as having found a right of feeding, merely, on the locus in quo, since the verdict, in that case, would be against the evidence; or why judgment should not be entered for the defendants on the issue upon the first plea in bar only, to the second cognizance, and, in that case, judgment be given for the plaintiff non obstante veredicto, inasmuch as the defendants, upon that issue, claimed to have land appurtenant to land; on which point *Richards* cited *Buszard v. Capel* (a). A rule nisi was granted.

Chilton, Evans, and *E. V. Williams*, shewed cause in this term (b). The real question which both parties intended to try was as to the right of exclusive pasturage, not the ownership of the land. The right to a sheepwalk is well understood in *Wales*, and is never considered as involving the claim of title to the

(a) 8 B. & C. 141. S. C. (*Capel v. Buszard*) in Error, 6 Bing. 150.

(b) June 6th. Before Lord Denman C. J., *Littledale, Pattenon*, and *Williams* Js.

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soil. [*Williams J.* I had a strong impression throughout, that the evidence looked towards the right of soil, not that of common. I wished the jury to find what the right actually was, in order that the Court might afterwards give judgment according to the justice of the case, under stat. 3 & 4. *W. 4. c. 42. s. 24.*] The proof of a right of exclusive pasturage runs, to a considerable extent, in the same course with the proof of soil and freehold; and the jury may have thought themselves warranted in finding that *Mrs. Davies* had the right of soil: but, if a party means to claim only a modified right, and gives evidence which supports it, a jury ought not to be allowed to say that the claim shall go farther and the party be thereby prejudiced. No evidence here, as to any matter of fact, was inconsistent with the modified right. It is not easy to say how the defendants could have given more precise evidence to shew that *Mrs. Davies* had the pasturage only, and not the soil. . [*Patteson J.* By shewing that another person, claiming to be the lord, dug quarries in the land. *Lord Denman C. J.* In the absence of any such fact, proof of exclusive pasturing would be evidence of a right to the soil; and it is for the jury to draw the inference.] The evidence would not have been satisfactory on a plea of *liberum tenementum*. And there was proof of a title in the Crown. Neither the jury nor the witnesses could be expected to understand accurately the distinction between the privilege actually claimed here, and an ownership of the land. The doctrine of appurtenances is not without difficulty, even to lawyers, as appears (for instance) from the discussions in *Yates v. Clincard (a)* and *Hill v. Grange (b)*. In the latter

(a) *Cro. Eliz.* 704.(b) *Plowd.* 170.

case it was said by the Court that the word *appertaining* (to the messuage,) there should be taken in the sense of "usually occupied with," or "lying to," the messuage; "for when *appertaining* is placed with the said other words, it cannot have its proper signification, as it is said before, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*, and being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense, it is the office of Judges to take and expound the words, which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it." The expressions "belonging" and "part of the farm," here, must be construed with this latitude, [Lord Denman C. J. The whole object of the summing up in this case was to draw the attention of the jury to the legal distinction between right of soil and right of pasturage]. There is no ground for judgment non obstante veredicto. The averment, that *Smith*, and his tenants, occupiers &c., had the sole and exclusive right of pasture on the locus in quo, as belonging and appertaining to the messuage and farm &c., is not on the face of it objectionable; *Potter v. North* (a), Serjeant *Williams's* note (2) to that case (b), *Hoskins v.*

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(a) 1 *Saund.* 350.(b) 1 *Wms. Saund.* 353.

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Robins (a), *Harg. Co. Litt.* 122 *a*, note (6). In the last cited case "it was adjudged that the prescription" (for the customary tenants of a manor to have the sole and several pasture yearly and every year for the whole year at their will and pleasure, as belonging to their customary tenements) "was good; for it does not exclude the lord from all the profits of the land, as he is entitled to the mines, trees, and quarries: and the law has been so considered ever since; "though a man cannot prescribe to have *common eo nomine*, for the whole year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing;" 1 *Wms. Saund.* 353, note (2) to *Potter v. North (b)*, citing, among other authorities, *Co. Litt.* 122 *a*. And in *Hoskins v. Robins (c)*, where the copyholders had the sole pasture, and it was therefore contended that the lord could not distrain damage-feasant, because he had no interest in the herbage, the Court answered, that "the lord may distrain for other damage in his soil the cattle of any who have no right to put in their cattle, although he has not any interest in the herbage;" and it is added in a note (*d*), "For the lord's interest in the mines, trees, bushes, &c. still continues, to which damage may be done as well as to the grass, 1 *Vent.* 123, 163." (*e*). *Buszard v. Capel (g)* does not apply. There a distress for rent was made upon the land, which (according to one of the suppositions put by the Court) was claimed as appurtenant to land. Here the defendants have merely distrained cattle damage-feasant, which distress even commoners may make. [*Patteson J.* In *Davies v.*

(a) 2 *Saund.* 324.(b) 1 *Saund.* 350.(c) 2 *Saund.* 328.(d) 2 *Wms. Saund.* 328, note (13).(e) *Hoskins v. Robins*.(g) 8 *B. & C.* 141.

Pierce (a) there was a cognizance stating that the locus in quo was part of "a certain tenement of land called *Bulchystullen* sheepwalk;" but no point of law was raised upon the allegation of title. Lord Denman C. J. Nothing can be more ambiguous than the word "sheepwalk."]

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John Wilson, R. V. Richards, and W. M. James, contra. The defendants claimed on this record either the land, or a right in another's soil; if the last, the jury has found against them; if the first, their claim, which the jury has supported, is of land appurtenant to other land, which the law does not allow of; *Co. Litt.* 121 b., *Bro. Abr. Prescription*, pl. 19. And in fact the exclusive pasture here claimed was a corporeal hereditament, which could not appertain to land. Similar rights have been held to be tenements on which a party might come to settle, within the meaning of stat. 13 & 14 Car. 2. c. 12. s. 1.; *Rex v. Piddletrenthide* (b), *Rex v. Tolpudde* (c). In *Burt v. Moore* (d) it was held that a party renting the milk of twenty-two cows, to be exclusively depastured on a certain meadow, had such an interest in the land that he might distrain the lessor's cattle damage-feasant there. In *Capel v. Buszard* (in error) (e), it was agreed by the Court that the special verdict was inconsistent in stating that the exclusive use of the land was demised as appurtenant to the wharfs, but that the land itself was not demised; "because a grant of the exclusive use of the land is a grant of the land." [*Patteson J.* The ex-

(a) 2 T. R. 53.

(b) 3 T. R. 772.

(c) 4 T. R. 671.

(d) 5 T. R. 329.

(e) 6 Bing. 150.

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against
RICHARD.

clusive use there was for all purposes. *Littledale J.* The tenant of *Blaenmerin* could not have turned horses and cattle on this pasture.] The doctrine of giving a wide construction to words in favour of the intention applies to deeds, but ought not to be extended to pleadings. That the exclusive right of pasturage in this case was substantially an exclusive right to soil is clear from the nature of the place, which can be used only as a sheep-walk. If the case had gone to the jury as upon a question between two parties claiming common and nothing more, and they had found for one, superadding to their verdict that the land was his, that finding might have passed as surplusage: but here the learned Judge expressly called their attention to the point, whether the right alleged by the defendants was a mere privilege or a right of soil and freehold. And that, upon the evidence given by them, was a fair question for a jury. It lay upon the defendants, who relied upon a limited right, to make it out conclusively. If the finding is, in effect, that *Mrs. Davies* had the pasture, not for the exercise of a privilege appurtenant to *Blaenmerin*, but as her own soil, that is equivalent to a verdict for the plaintiff. [*Patteson J.* The finding seems to leave it ambiguous.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

After stating the nature of the action, and the pleadings, his Lordship proceeded:—Upon the trial, the jury have negatived the claim of the plaintiff in respect of *Tycoch*, upon satisfactory evidence as we think. The first avowry was abandoned by the defendant. [His

Lordship

Lordship then stated the other proceedings on the trial, and the finding of the jury. See p. 416, *antè*.] Upon this evidence and finding we think that the second avowry cannot be sustained.

Then, as to the application to enter a verdict for the plaintiff notwithstanding the verdict found, as it has been, for the defendants, it is to be observed that the plaintiff, as to the right set up by him (*viz.* right of common for *Tycoch*), has entirely failed; and therefore we do not think it right that he should be allowed to succeed in the cause, though, as has been stated, he had established no right, but the same has been, and we think properly, negatived by the jury.

There must therefore be a new trial.

Rule absolute for a new trial.

1836.

JONES
against
RICHARDS.

The KING *against* SANKEY, SMITH, and
WILLIAMS.

Saturday,
June 11th.

MAULE had obtained a rule, in *Easter* term last, calling upon *Richard Nicholas Sankey*, and *Humphrey Smith*, Esqrs., late bailiffs of the town of *Ludlow*, and Mr. *John Williams*, late town clerk of the same town, to shew cause why a mandamus should not issue, commanding them to deliver over to the present town clerk of *Ludlow* all books, minute books, books of account, rentals, maps, bills, receipts, vouchers, leases and counterparts of leases, securities, muniments, re-

A town clerk has a lien on papers of the corporation with respect to which he has done work as attorney or solicitor, but not on such as he holds merely as town clerk.

Seemle, that, if property be granted to a corporation, subject to a payment for

charitable purposes imposed by the grantor, this falls under the provisions of sect. 71 of stat. 5 & 6 *W. 4. c. 76.*; and that sect. 68 applies, not to such property, but to cases where the payment has been made by the gift of the corporation itself.

ords,

1886.

The King
against
SANKEY.

ords, and papers, and all plate and other articles of every description whatsoever, of or belonging to the borough and corporation of the said town, or relating to the property thereof, in the custody, possession, or power of them, or either of them.

The affidavit, on which the rule was obtained, stated that *Sankey* was the high bailiff, *Smith* the low bailiff, and *Williams* the town clerk, of the corporation of *Ludlow*, before and up to the passing of stat. 5 & 6 W. 4. c. 76. That by the new town council, chosen under that act, *William Downes* was elected town clerk. That by charters of *Edward 4th* and *Edward 6th* certain lands had been granted to the corporation. That, on the election of the new town council and town clerk, it became the duty of *Williams*, *Sankey*, and *Smith*, to deliver up to them all papers, books, deeds, muniments, plate, leases, counterparts of leases, &c., belonging to the corporation. That applications had been made to the three to do so, by order of the town council; but that they refused.

In answer, *Sankey* and *Smith* made affidavit that, by a charter of 6 *Edward 6th* (26th April 1552), the king, for the relief and better sustaining the town of *Ludlow*, and for other reasonable causes and considerations, granted all the site, circuit, and precinct of the late house of the *Palmer's Guild*, &c., in *Ludlow*, and all the houses and premises within &c., and all messuages, &c., in the several parishes and hamlets of &c., to the Bailiffs, Burgesses, and Commonalty of *Ludlow* (the then style of the corporation), to hold to them and their successors for ever; and the said king understanding that certain burgesses, predecessors of the then burgesses, had erected the guild to be serviceable to pious uses, to wit,

for

or sustaining the poor and impotent, and also, for maintaining a grammar school, and for other pious uses, had granted the said messuages and premises to the aid guild, he therefore willed that the said bailiffs, &c., out of the issues and profits of the premises, should keep and continue the said grammar school, &c., the same to be kept by one master and one usher, and should keep and maintain thirty-three indigent persons within the said town, giving to every of them 4*d.* every week, and one chamber for every one of them to live in, and also that a discreet and able person, learned in holy writ, should be appointed preacher of the said town, and that another able and fit person should be chosen to be assistant to the rector of the church of *Ludlow*, both which persons should be for ever maintained out of the issues and profits of the said premises. That some other estates, not granted by the above charter, had vested in the said corporation for charitable purposes, before its dissolution. That the late members of the corporation, as trustees of the said charities, had retained possession of the books of account relating to the said estates. That neither of the deponents had now, nor had had at any time since the dissolution of the late corporation, in their custody, possession, power, or control (excepting certain articles named, which they had given up, or offered, before the application for the mandamus, and been at all times willing, to give up), any property, real or personal, or any deed, paper, or document whatsoever belonging to the corporation, except that they had, since the dissolution of the late corporation, joined with the other persons, being members of the said corporation at the time of its dissolution, in retaining possession of the said
estate

1836.

The King
against
SANKET.

1836]

The King
against
Sankey.

estate and property so vested as aforesaid, and the said books of account, deeds, and papers relating thereto.

Williams also made affidavit that he had delivered up all books, deeds, and papers belonging to the corporation, except some few leases and counterparts of leases, upon which he had a lien for professional business done, and which came into his possession as solicitor to the corporation: that, after receiving a notice to give up the books and papers, he told the new town clerk of the above circumstances, and asserted his lien on the leases and counterparts, to which the latter answered, "very true," and appeared to acquiesce in the claim; and that he, *Williams*, therefore understood that neither the town clerk nor the present council would claim the leases or counterparts adversely to the lien. That, at the time of granting the rule, he had not, nor had now, in his possession, or under his control, any deeds, documents, goods, chattels, or effects of the corporation, except the said leases and counterparts.

Sir *John Campbell*, Attorney-General, Sir *F. Pollock*, and *Cleasby*, now shewed cause on behalf of *Williams*. *Williams* has refused nothing which the applicants had a right to demand from him. He was attorney as well as town clerk: he had, therefore, a lien on all papers respecting which he had done work professionally; and the fact that he was town clerk cannot deprive him of it, though it might be said that no lien could exist as to muniments of the corporation which he held merely in the character of town clerk.

Sir *W. W. Follett* and *Chandless* shewed cause for *Sankey* and *Smith*. It does not appear that *Sankey* or *Smith*

Smith have any property in their hands which they have refused to give up. And the present applicants have no right to the estates in question, nor to the documents relating to them. By stat. 5 & 6 W. 4. c. 76. s. 71, the old trustees are to hold the property on, till August 1st, 1836; after that their estate ceases; but the present corporation acquire no right even then. Besides, a mandamus is not the proper remedy for recovering the lands, even if they are not properly held in trust. And the documents are not such public documents as are the subject of mandamus: the proper remedy is trover; *Anonymous Case in Chitty's Reports (a)*.

1836

The King
against
Smeaton

Maule and *Erle* in support of the rule. Under sect. 65 the deeds, &c., are to be kept where the council direct: and the town clerk is responsible for the charge. The estates in question are not held on charitable uses or trusts: the property is granted to the corporation, with an injunction from the Crown to perform certain charitable acts. The corporation, therefore, retains its property: there is no new creation of a corporation by the act. It is clear that the corporation never were trustees as to the whole property: and a mere injunction of this sort does not even make them trustees "in part," within the meaning of sect. 71. This is rather the case provided for by sect. 68; the corporation may be perhaps compellable to grant a bond for future payments. If this property were within the provisions of sect. 71, no case can be suggested to which sect. 68 would apply. As all the late members of the corporation claim to hold the property, it was necessary to join the town clerk. As to the lien which

(a) 2 Chitt. R. 255.

1896.

**The King
against
SARREY.**

the latter claims on the leases, he must have obtained possession, in the first instance, as town clerk: he has no more right to retain them than to retain any book in which he has made a single entry.

LORD DENMAN C. J. There is no ground for this rule. The town clerk clearly has a lien on the papers which he claims to retain, for all which he has done in his professional character. And indeed he has not actually refused to deliver them up: for, when he made the claim of lien, there was an apparent acquiescence. Then the other parties are not in possession of any thing which they have refused to deliver up. These facts make a short end of the case: and the rule must be discharged with costs. The question on sections 68 and 71 does not therefore arise. If it did, I should strongly incline to think that sect. 68 relates merely to grants made by the corporation themselves.

LITLEDALE J. I think the town clerk has a lien on the papers which he detains, though he would have none upon muniments with respect to which he had performed no service as attorney; for he would hold those only as servant to the corporation. Then the other parties have refused nothing. I think sect. 68 applies only to what the corporation itself gives. Sect. 71 provides for such property as is held "in whole or in part" upon charitable uses or trusts. The part for which this property is so held seems small: but in that the present corporation have no interest.

PATTESON J. I have no doubt that a town clerk who does business as an attorney acquires a lien, although

although he is town clerk, and although he has no lien on what he receives merely as town clerk, nor for business done merely in that character. I recollect no instance in which this distinction has been taken in the case of a town clerk: but it has often been mentioned in the case of a steward of a manor. In *Worrall v. Johnson* (a), Sir Thomas Plumer, Master of the Rolls, pointed out that an attorney's lien extended merely to debts due to him as attorney. Here is a lien, though not to a definite amount, apparently acquiesced in; so that there is no refusal by him. Therefore, as to Mr. *Williams*, the rule must be discharged with costs. As to the other parties, it is left doubtful whether they have any thing in their hands. If they had, the answer to this application would be either that the documents were in Mr. *Williams*'s custody as their servant, or that they were retained under sect. 71. But we are not compelled to decide as to the effect of such an answer. I should, however, agree with my Lord and my brother *Littledale*, that sect. 68 applies to cases where the grant is by the corporation, sect. 71 to cases where the corporation take property granted them by another wholly or partially in trust. This does not mean, where some is granted to one trustee, some to another: for that case is provided for by the words "solely, or together with any person" &c.: but where the property granted is held in trust as to a part of that property.

Rule discharged, with costs (b).

1836.

—
The King
against
SANKET.

(a) 2 Jac. & W. 214.

(b) *Williams J.* was absent.

1836.

Saturday,
June 11th.

The KING against TWYFORD and GROVE,
Esquires.

Under stat.
17 G. 3. c. 56.
ss. 1, 2, 20,
22, two justices
may convict
and sentence to
imprisonment
and hard labour;
and the party
convicted may
appeal to ses-
sions, giving
notice to the
justices at the
time of con-
viction, and at
the same time
entering into
recognizance,
with sufficient
sureties, to try
the appeal and
abide the judg-
ment of ses-

sions: but, if he do not at such time enter into such recognizance, the convicting justices are to commit him till the sessions, unless such recognizance be sooner entered into, and are to transmit the conviction to the sessions; and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and, if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation.

A party convicted by two justices, and sentenced to eleven weeks' imprisonment and hard labour, gave notice of appeal, and was committed for not entering into recognizance. By the practice of sessions, the appeal is to be entered, and the order for hearing it obtained, by the party disputing the conviction. The party not having entered the appeal, the sessions discharged him.

Semle, that the convicting magistrates had no longer power to commit in execution of the conviction.

But held that, at any rate, no mandamus should be granted to compel them to do so.

ON the 9th of April 1836, Richard Nash was convicted before Samuel Twyford and William Grove, Esqrs., two justices of the peace for Middlesex, of unlawfully purloining and embezzling certain articles of silk manufacture entrusted with him by Ambrose Moore to prepare and work up, he being hired and employed by A. M., &c., and was adjudged to be committed to the House of Correction at Cold Bath Fields for eleven weeks, to be kept to hard labour, under stat. 17 G. 3. c. 56. s. 1.

Upon the judgment being pronounced, Nash gave notice in writing of his intention to appeal (a) at the next general

(a) Stat. 17 G. 3. c. 56. s. 20. enacts that, if any person shall think himself aggrieved by the order or judgment of any two justices, before whom he shall have been convicted of any of the offences in the act, or in certain acts therein recited, he may appeal to the next general or general quarter sessions, giving notice in writing, at the time of the conviction, to the justices, and, at the same time, entering into a recognizance, with sufficient sureties, conditioned to try the appeal, abide the judgment of

general sessions of the peace, but did not enter into recognizances with sufficient sureties, and was thereupon committed by the justices to the house of cor-

1836

The King
against
Two

of sessions, and pay such costs as shall be there awarded; "but if the person giving such notice of appeal shall not, at the time of giving such notice, enter into such recognizance as aforesaid, then the justices, to whom such notice of appeal shall have been given, shall and may commit such person or persons to the house of correction, or other public prison, of such county," &c., "there to remain until the said next general or general quarter sessions of the peace to be holden in and for such place, unless such recognizance shall be sooner entered into; and the said justices before whom such conviction shall have been made, or any other two or more justices of the same county," &c. "are hereby empowered and required to take, and the justices at such sessions are hereby authorised and required, upon due proof made of such notice of appeal, either by the acknowledgment of the justices to whom the same shall have been given, or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party: and if, upon the hearing of such appeal, the judgment of the justices before whom the appellant shall have been convicted, shall be affirmed, such appellant shall, within forty-eight hours next after the same shall be so affirmed, suffer such corporal punishment as shall have been directed to be inflicted upon him or her for the offence whereof he or she shall have been convicted, or shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expenses sustained by the defendant or defendants in such appeal; or in default of making such payments shall be committed to the common gaol, or house of correction, in the same manner, and for the same time, to be computed from the affirmance of such conviction, as shall be directed by the original judgment of conviction, unless the person or persons so convicted shall have been imprisoned under the original conviction, in which case the time for which such person or persons shall have been so confined shall be included in the order of confirmation."

By sect. 22. the convicting justices are to transmit the conviction to the next general or next general quarter sessions, to be filed and kept amongst the records of the sessions; and, in case of appeal, the justices at sessions are "required, upon receiving the said conviction drawn up in the form aforesaid, to proceed to the hearing and determination of the matter of the said appeal," according to the direction of stat. 22 G. 2. c. 27.

V. V.

F f

rection,

1836.

The King
against
TWYFORD.

rection, to be kept in custody till the next general sessions, unless such recognizances should be sooner entered into, or until he should be discharged by due course of law.

The practice of the *Middlesex Sessions*, on appeals against convictions, is, that, on the first or second day of a session, the appellant files a petition of appeal, and obtains an order of Court for hearing on the appeal day, a copy of which petition and order is served by him upon the convicting justices.

On the third day of the sessions, being the day next before the appeal day, the attorney for the prosecution ascertained that no appeal had been entered or petition filed (of which he procured the usual certificate from the clerk of the peace), and that *Nash* had been discharged out of custody on the second day of the sessions; upon which the attorney applied to Messrs. *Twyford* and *Grove* for a warrant against *Nash*, that he might be apprehended and committed in execution of the sentence passed by them; but they declined to grant the warrant, entertaining doubts of their power to do so.

On affidavit of the above facts, *Kelly*, in this term, obtained a rule nisi for a mandamus to the magistrates to issue their warrant for the apprehension and commitment of *Nash* pursuant to the record of conviction. The record, commitment for want of recognizance, and certificate of the clerk of the peace, were annexed to the affidavit; and the following entry appeared upon the commitment:—"Discharged by the Court," signed by the clerk of the peace, and dated 17th of *May* 1836, the second day of the sessions.

Barstow

Barstow now shewed cause. The magistrates have no power to issue this warrant, whether it be considered analogous to mesne process or to execution. The Court of Quarter Sessions, in discharging *Nash*, have either exercised a proper jurisdiction or acted illegally. On the former supposition, *Nash* is entitled to be at liberty; on the latter supposition, what has taken place is in the nature of an escape, and the power of the defendants is exhausted. They have no legitimate knowledge that *Nash* is not in custody. Perhaps, if he had actually entered into recognizances, and had not performed the condition, application might have been made for a fresh warrant: but here there has been no default. It is understood that the sessions made the order for his discharge supposing that the return of the conviction gave them jurisdiction and made them cognisant of the appeal, and that then it was for the prosecutor to sustain the conviction.

Kelly contra. If *Nash* had not given notice of appeal, it would have been the duty of the convicting magistrates, immediately upon the conviction, to make out a warrant of commitment in execution. That duty was suspended by the notice of appeal. Then it was for the appellant to take certain steps, in default of which, according to the practice (and the act must be construed with reference to that), the sessions had no power to proceed. The respondent could not, by admitting the notice, have a conviction affirmed against which no appeal was entered. Thus the commitment was at an end: the justices had no power to order the prisoner to be detained, nor the gaoler to detain him. Then the case stood as it did after the conviction and before the commitment for want

1836.

The King
against
Twyford.

1836.

The King
against
Twyden.

of recognizance. The convicting magistrates were therefore to make out the warrant of final commitment. [*Patteson* J. How are they to make allowance for the time during which the convict has been confined, as would have been done if the conviction had been affirmed on appeal under stat. 17 G. 3. c. 56. s. 20. ?] Such allowance could be made only in case the appeal had been prosecuted: the party convicted, as he has not chosen to prosecute it, cannot complain. [*Patteson* J. I think that imprisonment, for want of recognizance, and unless recognizance be sooner entered into, is an imprisonment "under the original conviction," within the meaning of the legislature in stat. 17 G. 2. c. 56. s. 20.; then you are asking us to imprison a second time.] The imprisonment already suffered can scarcely be called a part of the imprisonment for eleven weeks under the conviction: if it were, the mandamus might be framed accordingly, ordering a commitment for the residue of the time; but the party convicted has lost the benefit of this provision by his default in not prosecuting the appeal. Part of the punishment adjudged was hard labour; none has been suffered during this imprisonment.

Lord DENMAN C. J. Before we grant the mandamus which is asked for, we must clearly see that the convicting magistrates have power to do what is demanded. But I rather think they have not the power. For an imprisonment for want of recognizance seems to be considered by the legislature, in some sense, a part of the imprisonment under the conviction. The utmost that can be said (and it is a point on which we are not bound to give an opinion) is, that the original sentence

is to stand. But it is so doubtful whether the convicting justices have not done all they have power to do that I think we cannot grant this mandamus.

1836:

~~_____~~
The King
against
Trevett.

LITLEDALE J. Whether the magistrates have any power is a question so doubtful that we ought not to grant the mandamus, lest we should subject the magistrates to an action for false imprisonment. Their power was suspended by the notice of appeal. The party giving the notice is committed for want of recognizance. Suppose a party, being under such circumstances, or having entered into a recognizance, takes no step. What follows? The conviction is transmitted to the sessions by the convicting magistrates. Can the sessions do any thing? That we need not decide: they do not in fact offer to do anything. The justices at sessions, therefore, have no power to detain, though the party convicted is not discharged by what is commonly called proclamation. Then have the convicting justices power to act upon their conviction? They have not, unless what has passed since the conviction amount to nothing. Section 20, though not precisely worded, seems to authorise only a continuation of the imprisonment in the event of the conviction being affirmed on appeal. If the convicting magistrates were now to issue their warrant to imprison for eleven weeks, it might turn out that half the imprisonment originally adjudged had been already suffered. It is a very doubtful case, not, I think, provided for by the act. The inclination of my opinion is, that the convicting justices had no longer any power: certainly it is not a case for a mandamus.

1836.

The King
against
TWYFORD.

PATTESON J. At all events this is a very doubtful case; and therefore there can be no mandamus. The act clearly means that, where there is notice of appeal, the convicting magistrates are to commit in case of a recognizance not being given, and that only till the sessions. Then the sessions have power to order imprisonment, but only in the case of the appeal being confirmed by them. If there be no recognizance, and the appeal be not prosecuted, a case arises which the act does not seem to have contemplated. Whether the sessions have an original power to bring the matter forward, I do not know; but I cannot see that the act reserves any jurisdiction to the convicting magistrates in case of notice of appeal being given.

Rule discharged (a).

(a) *Williams J.* was absent.

Saturday,
June 11th.

WILLIAM GWINNELL *against* EDWARD HERBERT.

The indorser of a promissory note does not stand in the situation of maker relatively to his indorsee.

The indorsee of a note cannot declare against his indorser as maker, even where the latter has indorsed a note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the original maker.

ASSUMPSIT. The declaration stated that the defendant, on &c., made his promissory note, and thereby promised to pay the plaintiff 7*l.* 12*s.* 6*d.*, one month after date, which period had elapsed. There was also a count on an account stated. Pleas, that defendant did not make the said note in manner &c.; concluding to the country: and, as to the account stated, the general issue. On the trial before the under-sheriff of *Gloucestershire*, February 19th, 1836, the note was put in. It was payable to *William Gwinnell* or order, signed *Herbert Herbert*, and indorsed, in the defendant's hand-

writing

writing, *E. Herbert*. Under that name was written *William Gwinnell*. The note had an eighteenpenny stamp. The under-sheriff objected that, *Edward Herbert* not being named on the face of the note, but on the back as an indorser, he was not maker as stated in the declaration. For the plaintiff, *Penny v. Innes* (a) was cited. No notice of dishonour was proved to have been given to *Edward Herbert*. The under-sheriff stated to the jury that, on the authority of the case cited, *Edward Herbert* must be considered as a new maker; and that, as against a maker, notice of dishonour was unnecessary. The plaintiff had a verdict, but the under-sheriff certified (under stat. 3 & 4. W. 4. c. 42. s. 18.), to stay judgment till a new trial could be moved for. *Busby*, in the ensuing term, moved for a new trial on the grounds that, assuming an indorser to stand in the situation of a new maker, he was not to be described in pleading as the maker; and that he was not, in effect, a maker. A rule nisi was granted.

1836.

 GWINNELL
 against
 HERBERT.

R. V. Richards now shewed cause. The under-sheriff's ruling, on the authority of *Penny v. Innes* (a), was right. In that case a bill drawn by *Wilson*, payable to his own order, and by him specially indorsed to *Brookes* and *Penny*, was next indorsed by *Innes*, and then by *Brookes* and *Penny*. Lord *Lyndhurst* there said "The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to *Brookes* and *Penny* to strike out their own indorsement; and then the bill would have stood

(a) 1 Cro. M. & R. 439. S. C. 5 Tyrwh. 107.

1836.

GWINDALL
against
HARRIST.

as a bill indorsed by the defendant in blank." *Plimley v. Westley* (a) may be mentioned as a contradictory authority; but there the note was not payable to order. Here, the instrument being negotiable, a new stamp was not necessary to render the indorser liable as a new maker. The note was a new instrument in some respects, but not in all. If a party is possessed of a note or bill without proper title, and transfers it, he is liable, because the law will not allow him to say "I have no title, and therefore my indorsee can have none against me." [*Patteson J.* Every indorser of a bill may be a new drawer; but the maker of a promissory note is an acceptor.] Unless the defendant here can be sued as maker, there is no remedy; he ought not to be discharged merely because a person who ought to have indorsed has omitted doing so.

Busby, contra. By the custom of merchants, the indorser of a note stands in the place of the drawer of a bill, as is said in *Heylyn v. Adamson* (b); but he is never declared against as a drawer in fact. As to the maker of a note, Lord *Mansfield* observes, in the case just cited (b), that he is an acceptor (not a drawer), and that, when the note is indorsed, the indorser stands in the situation analogous to that of drawer of a bill. He could not, indeed, stand in the situation of acceptor, because then he and the maker would both fill that character; and there cannot be two acceptors; *Jackson v. Hudson* (c). It is not necessary, therefore, to call in question the authority of *Penny v. Innes* (d). Here, the defendant might have been sued upon the original consideration:

(a) 2 New Ca. 249.

(b) 2 Burr. 676.

(c) 2 Camp. 447.

(d) 1 Cro. M. & R. 439. S. C. 5 Tyrwh. 107.

but,

but, if sued upon the note, he should have been declared against as indorser; in which case it would probably have been held that he was estopped from setting up as a defence the want of an indorsement to himself.

1836.

—
GWINNELL
against
HERBERT.

LORD DENMAN C. J. The under-sheriff has acted upon a misapplication of *Penny v. Innes* (a). The law there laid down as to the effect of indorsement might be correct as to a bill of exchange, but does not apply to a promissory note. The judgment of Tindal C. J. in *Plinley v. Westley* (b) seems intended not to overrule any thing laid down in *Penny v. Innes* (a), but to be consistent with what was there decided.

LITLEDALE J. The declaration here charges *Edward Herbert* as the maker of the note. It must be taken that in point of fact the note was made by *Herbert Herbert*; then the question is, whether he is discharged, and a new instrument created, by *Edward Herbert's* name being put on the back of the note. I cannot understand how that should be so. It is said that, in the case of a bill of exchange, every indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered a new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing. But, supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker. The drawer of a bill is

(a) 1 Cro. M. & R. 439. S. C. 5 Tyrwh. 107. (b) 2 New Ca. 249.

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HERBERT.

liable only after presentment to the acceptor; but the maker of a note is in the situation of acceptor. In this case, therefore, it cannot be said that the indorser became a maker, or that the putting of *Edward Herbert's* name on the back of this bill had, for the present purpose, cancelled the engagement of *Herbert Herbert*. The observation, which has been referred to, of Lord *Ellenborough*, in *Jackson v. Hudson (a)*, appears to me correct.

PATTESON J. The issue here is, whether or not the defendant made the note. There is no conflict between the cases on this subject. The whole question turns on the distinction between a bill and a note. On a bill, each indorser is a new drawer, as was stated in *Penny v. Innes (b)*; but the drawer of a bill is liable only on default made by the acceptor. The maker of a note is liable in the first instance; and, if each indorser became a maker, he also would be liable in the first instance. There is a difficulty, therefore, in the case of a note, which does not exist in that of a bill. The point in *Plimley v. Westley (c)* was, that, the note not being on the face of it negotiable, the persons whose names appeared on the back were not indorsers, and might have been treated as makers if the instrument had been properly stamped. Here the instrument was negotiable; so that the point discussed in *Plimley v. Westley (c)* does not arise. This case is more like *Jackson v. Hudson (d)*, where, the drawee having accepted a bill, and another person, not a drawee, having accepted it also, it was held that the latter could not be sued as an acceptor. So, here, the defendant was not a maker, but, as was said

(a) 2 Camp. 448.

(b) 1 Cro. M. & R. 439. S. C. 5 Tyrwh. 107.

(c) 2 New Ca. 249.

(d) 2 Camp. 447.

in that case, should have been declared against on his collateral undertaking.' In the report of *Plimley v. Westley* in 1 *Hodges* (a), the Lord Chief Justice says, "that a bill or note cannot be enforced against the original maker, by a person who takes by indorsement, unless the instrument contains words which authorise the indorsement." A proper distinction is there kept in view. Some confusion has arisen in many of the cases from not attending to the distinction between a bill and a note. The rule must be absolute.

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GWINDWELL
against
HEADBURN.

WILLIAMS J. concurred.

Rule absolute.

(a) 1 *Hodg.* 325.

The KING *against* JAMES ISLEY, and GRACE, his Wife. Saturday,
June 11th.

IN last *Hilary* term, the Court, at the instance of *Samuel Gregory* and *William Wilkins*, the guardians after-named, granted a habeas corpus (returnable before a judge at chambers) directed to *James Isley* and *Grace* H., the father of two children, on his wife's death, requested her father and mother to come from America, where they
were settled, to *England*, and there take charge of the children, which they did. About four years afterwards *H.* died, having made his will the day before, in which he left his property to trustees to be converted into money and divided between his two children when of age, the interest to be applied in the meantime, by the trustees, for their education, &c.; and he appointed the trustees guardians of the persons and estates of the children, and requested them to cause the children to be properly educated. 3000*l.* bank annuities was vested in other trustees, for the benefit of the children, under the testator's marriage settlement. No real property passed to either child from the testator. The grandfather and grandmother, who, ever since their coming to *England*, had had the custody of the children, refused to deliver them up when demanded by the guardians. The Court, on habeas corpus, ordered them to do so.

While the habeas corpus was depending, the grandfather and grandmother filed a bill in Chancery on behalf of the children, against the guardians, for an account, and to have the children and their property put under the protection of that Court. The guardians put in their answer, about a month before the above decision.

Seemle, that, if it had been shewn to this Court that a speedy decision in Chancery was to be expected, they would have delayed enforcing the writ.

his

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The KING
against
ISLEY.

his wife, commanding them to bring up the bodies of *Matilda Harris* and *Benjamin Harris*. The writ was granted upon a statement, in substance as follows.

Benjamin Harris, the father of *Matilda* and *Benjamin*, died *May* 17th, 1835. By his will, dated *May* 16th, 1835, he bequeathed all his real and personal estate and effects to the said *S. Gregory* and *W. Wilkins* in trust to convert into money all his personal estate not consisting of money, and to sell the real estate, and to put out the proceeds (after payment of debts, &c.) at interest on government or freehold security, "the principal to be divided between my two children, *Matilda* and *Benjamin*, share and share alike, and to be paid on his or her attaining the age of twenty-one years, the interest in the mean time to be applied for their benefit, advantage, and education, in such manner as to my said trustees or the survivor of them, his executors or administrators, shall seem meet." The will concluded as follows:— "I appoint the said *Samuel Gregory* and *William Wilkins* executors of this my last will and testament, and also guardian and guardians of the persons and estates of my children. And I earnestly request that my said trustees and executors will, according to their discretion, cause my said children to be properly brought up and educated; and I authorise them, my said trustees and executors, to retain and reimburse themselves and himself out of the monies that shall come to their or his hands or hand by virtue of the trusts hereby in them reposed, all costs, charges, and expenses which they shall be put unto in execution hereof." *Gregory* and *Wilkins* proved the will and took upon themselves execution. The children were in the custody of *James* and *Grace Isley*, their grandfather and grandmother, who

who refused, when required by the trustees, to give them up. The trustees now stated that *James* and *Grace Isley* were very improper persons to have the custody of the children, moving in a sphere of life below that to which the children's expectations authorised them to aspire (*a*); and that it was necessary that the children should be delivered up to the trustees, in order that they might carry into effect the testator's intentions, and educate and provide for the children in a manner suitable to their fortune, and agreeable to the testator's wishes.

Isley and his wife claimed to retain the custody on the following grounds. That the mother of the children, who was *Isley's* daughter, died about five years ago, and on that occasion *Isley* came, with his wife and family, from *America* where he then resided, at a considerable inconvenience and sacrifice, on the testator's written request, for the purpose of taking care of the children, who were then placed under Mr. and Mrs. *Isley's* charge, and had continued with them ever since. That Mr. and Mrs. *Isley* came to *England*, and undertook this charge, in consequence of a promise to the mother, and would not have done so but for such promise. That the father had often, in his life-time, expressed himself grateful for their care and attention, and declared his intention never to remove the children as long as they were kindly treated. That the children were aged respectively nine and six years, one of them weak in intellects, and both delicate in health and requiring much care: and that they had in fact been kindly and carefully treated by Mr. and Mrs. *Isley*. It further appeared that, by a settlement made on the

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The King
against
Isley.

(a) *Isley* described himself as "of *Trowbridge*, carpenter."

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marriage of the testator and his late wife, 3000*l.* 4 per cent. bank annuities were vested in other trustees than *Gregory* and *Wilkins*, for the benefit (among other purposes) of the issue of the marriage, and that the trustees under the settlement continued so interested, for the benefit of the children *Matilda* and *Benjamin*.

The parties attended before *Patteson J.* at chambers, in pursuance of the writ, and, on *February* 16th, the learned Judge (after having taken time for consideration) stated that he felt so much difficulty in the case that he thought the question ought to be referred to the Court in the next term. Shortly after this time, *Isley*, as the grandfather and next friend of the children, filed a bill in Chancery on their behalf against *Gregory* and *Wilkins*, as executors of *Benjamin Harris's* will, for an account, and for the purpose of placing the children and their property under the protection of that Court. *Gregory* and *Wilkins* filed their answer on the 9th of *May*.

Erle now moved, on behalf of the prosecutors, for the order of the Court. An additional affidavit, by the testator's brother, was put in, stating that the testator had, before his death, expressed a wish that the children should not remain with their grandmother, whom he considered an unfit person, and had desired the deponent to ask *Gregory* and *Wilkins* if they would become the guardians of the children in the event of his death.

Cresswell and *Joseph Addison*, for the defendants. It is a preliminary objection to any proceeding for the purpose of changing the custody, that a bill in Chancery is depending, which involves this very question.

And,

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And, further, it may be questioned whether *Gregory* and *Wilkins* can entitle themselves in this case as guardians under stat. 12 Car. 2. c. 24. s. 8., for the statute seems to contemplate the appointment of guardians in those cases only where there might have been guardians in socage. In *Bedell v. Constable* (a) *Vaughan* C. J. says, "I take the sense of the act, collected in short, to be, whereas all tenures are now socage, and the next of kin to whom the land cannot descend is guardian until the heir's age of fourteen: yet the father, if he will, may henceforth nominate the guardian to his heir, and for any time, until the heir's age of one and twenty; and such guardian shall have like remedy for the ward, as the guardian in socage by the common law hath." But, even if the Court should think that these are guardians in socage, still this is not a case for interference on habeas corpus. The rule in cases of habeas corpus to bring up infants is stated by Lord *Mansfield*, in *Rex v. Delaval* (b), to be, that "the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." In a case referred to in *Lyons v. Blenkin* (c), Lord *Eldon* observed that there were circumstances which might have weight on an application made in a cause to alter the custody of wards of the Court (as where their expectations from relatives might be interfered with by their continuance with the father), but which could not be attended to on a habeas corpus. Here, even if the father had been

(a) *Vaugh.* 183.(b) 3 *Burr.* 1436.(c) 1 *Jacob's Rep.* 254. note (b).

alive,

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The King
against
Infant.

alive, the Court would not have taken the children from the defendants at his instance, after the sacrifice they had made in consequence of his own arrangement. But this is a will made by the testator only the day before his death, in opposition to his formerly declared intentions. The bulk of the property, being in trustees under the marriage settlement, cannot be affected by the result of this application.

Erle and Leigh, contra. The arrangement made by the father could be considered only as a temporary one. It must have been obvious that circumstances might arise (without any immoral or improper conduct on the part of the defendants) which would make the removal of the children expedient. Even supposing the facts to be such as would have entitled the defendants to sue the father, if still alive, for withdrawing the children, that would be no answer to an application for a change of custody with a view to the children's interest. An actual covenant by the father, in a deed of separation, that the children shall remain in a certain custody, is no answer to an application on his part by habeas corpus to have them delivered up to him; *Ex parte Earl of Westmeath* (a). As to the right of testamentary guardians under stat. 12 C. 2. c. 24. s. 8., where there could not have been a guardian in socage, the statute gives the father power to dispose of the custody and tuition of his child or children, while under the age of twenty-one, without any restriction of the kind which has been suggested. The limitation inferred from the dictum of *Vaughan C. J.* in *Bedell v. Constable* (b) is not supported by any other

(a) 1 *Jacob's Rep.* 251. note (c), to *Lyons v. Blenkin*.

(b) *Vaugh.* 183.

authority.

authority. Then, is the interposition here called for such as the Court has been accustomed to grant? *Rex v. Delaval* (a) shews that it is to be granted on proper occasions. *Rex v. Johnson* (b) is more in point. In the case before Lord Eldon, referred to on the other side, his Lordship said "that the jurisdiction which he had upon an *habeas corpus* was exactly the same as if it was before a judge, and he apprehended that a judge attended to nothing but cruelty or personal ill-usage to the child, as a ground for taking it from its father" (c). Whatever can be said of a father on this point applies also to testamentary guardians, who, according to many authorities, are in loco parentis: *Eyre v. Countess of Shaftesbury*, per Lord Commissioner Jekyll (d); *Butler v. Freeman*, per Lord Hardwicke C. (e). [Lord Denman C. J. asked if there was any prospect of a speedy decision in Chancery. No answer was given, but by referring to the affidavit on this head, the substance of which has been stated.]

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—
The King
against
Isaac.

LORD DENMAN C. J. There is no ground for arguing that this appointment of guardians was not really the will of the testator. He has clearly appointed the parties, now prosecuting, guardians to his children. Under these circumstances, although we should not consider our discretion tied up if there were a reasonable prospect of an order of the Court of Chancery being obtained, we think we ought not to make a delay

(a) 1 *W. Bla.* 410. *S. C.* 3 *Burr.* 1434.(b) 1 *Str.* 579. *S. C.* 2 *Ld. Ray.* 1333.(c) 1 *Jacob's Rep.* 354. note (b), to *Lyons v. Blenkin*.(d) 2 *P. Wms.* 115.(e) *Amb.* 302.

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against
ISLEY.

which might appear like tampering with the rights of the guardians. We have, I think, no choice as to the course we should pursue, but must order the children to be delivered up to them.

LITLEDALE J. I am of the same opinion. A guardian appointed as these are is in the same situation as a parent. We must enforce the right of the guardians, unless we could see that the will was made in a manner contrary to the real wish of the testator. But it appears that his intention in fact was to remove the children in the manner which the will points out. If we saw reason to expect a decision in equity on the point, our course of proceeding might be different.

PATTESON J. I was not satisfied at chambers, nor am I yet, that the father really intended the custody of his children to be changed. But I think we have no choice as to our mode of proceeding. I hoped at first that, by not now changing the custody, we might give an opportunity for the point to come before the Court of Chancery; but, as there appears no likelihood of that, the strict legal right of the guardians must prevail (a).

An order was afterwards made (*June 13th*) that the defendants should deliver up the bodies of the children to the guardians.

(a) *Williams J.* had left the Court.

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DOE on the several Demises of HURST and *Saturday,*
Others, *against* CLIFTON. *June 11th.*

This case is reported, 4 *A. & E.* 809.

The KING *against* JOHN WILSON.

Monday,
June 13th.

This case is reported, 3 *A. & E.* 817.

PEACOCK, Assignee of JOHN JONES, an Insolvent *Monday,*
Debtor, *against* HARRIS. *June 13th.*

ASSUMPSIT for goods sold and delivered, and for work and labour performed by the insolvent; promise to him before his petition. Damages 40*l.*

In assumpsit by the assignee of an insolvent debtor, for money due to the insolvent

debtor before his petitioning, defendant pleaded that the insolvent, before he petitioned, and more than three months before the commencement of his imprisonment, assigned his debts and effects to *W.*, in trust for creditors, and made *W.* his attorney; that *W.* demanded the debt of defendant; that defendant paid him; and that the insolvent did not execute the indenture with intent to petition. Replication, that the indenture was executed by the insolvent, being then in insolvent circumstances, voluntarily, and within three months before the commencement of his imprisonment, and with intent to petition. Rejoinder, traversing the intention only.

Held, that the plaintiff could not give in evidence, in support of this issue, the contents of the schedule delivered by the insolvent to the Insolvent Debtors' Court, more than four months after the execution of the indenture.

The verdict having been for plaintiff, and a new trial having been granted on account of the admission of such evidence, plaintiff gave fresh notice of trial, whereupon defendant withdrew his pleas, and suffered judgment by default; and a writ of inquiry was executed: Held, that plaintiff was not entitled to his costs of the first trial.

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 against
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1st plea, non assumpsit. 2d plea, as to 28*l.* 7*s.* 6*d.*, parcel &c., that, before the insolvent petitioned, and three months and more before the commencement of his imprisonment, to wit 1st of *January* 1833, by indenture then made (and of that date) by the insolvent of the first part, one *Samuel Whooley* of the second part, and all others the creditors of the insolvent who should execute that indenture of the third part, he, the insolvent, bargained and sold, assigned, transferred, and set over to *Whooley* all and singular his household goods and furniture, stock in trade, chattels, book-debts, and effects, in trust for *Whooley* and such creditors as should sign the indenture, and thereby made *Whooley* his attorney to ask, demand, sue for, recover, and receive the said stock, debts, &c.: averment, that the indenture was not made within three months before the imprisonment commenced, nor with the view or intention that the insolvent should petition the Court for the relief of insolvent debtors for his discharge from custody: that, before and at the time of making the indenture, the defendant was indebted to the insolvent in 28*l.* 7*s.* 6*d.*, parcel &c., and no more: that the defendant was required by *Whooley* to pay that sum to him: and that he did pay it to *Whooley*, who accepted and received it, in full satisfaction and discharge thereof, for the purposes in the indenture mentioned. Verification.

Replication. That the indenture was made and executed by the insolvent, then being in insolvent circumstances, voluntarily, and within three months before the commencement of his imprisonment, and with the view and intention of his petitioning the Court for relief
of

of Insolvent Debtors for his discharge from custody. Verification.

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Rejoinder. That the indenture was not made and executed by the insolvent with the view &c. Conclusion to the country. ,

On the trial before *Bolland B.*, at the *Denbighshire* Spring assizes 1835, the plaintiff's counsel, in support of his issue on the second plea, put in the insolvent's schedule, by which it appeared that his petition had been filed on 1st of *May* 1833: and the account given by the insolvent in the schedule, as to his estate, liabilities, &c., was insisted upon as evidence of his intention at the time of executing the indenture. The defendant's counsel objected to this, as amounting merely to evidence of declarations made by the insolvent subsequently to his execution of the indenture. The learned Judge received the evidence; and the jury found for the plaintiff on both issues, damages 30*l.* In *Easter* term 1835, *R. V. Richards* obtained a rule nisi for a new trial.

John Jervis and *Welsby* shewed cause in this term (a). The evidence objected to was given only in answer to a plea pleaded to a part of the demand: the jury have found damages beyond the part: therefore the plaintiff is at least entitled to retain the difference between 30*l.* and 28*l.* 7*s.* 6*d.* But the evidence is admissible. The signing of the schedule was an act done by the insolvent; and that is evidence of his intention in executing the previous deed, stronger than any declaration, being a formal act under the authority of the

(a) June 6th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams J.*

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Insolvent Debtors' Court. Now his declaration would have been admissible, to shew the intent; and, à fortiori, his acts must be so, the plaintiff's case being that the whole transaction was collusive, so that the execution of the schedule is a part of the fraud charged. In *Ridley v. Gyde* (a), in an action by assignees of a bankrupt, the commission was disputed: the act of bankruptcy relied on by the plaintiff was a security given by the trader on the 25th of *October*, which, it was contended, was a fraudulent preference: and the plaintiff was allowed to give in evidence a declaration by the alleged bankrupt, made on the 20th of *November* following, respecting his object in giving the security. In that case there was less ground for treating the declaration as part of the *res gestæ* than there is here for so treating the execution of the schedule. *Vacher v. Cocks* (b), *Herbert v. Wilcocks* (c), *Newman v. Stretch* (d), are to the same effect. The insolvent is in fact a party concurring in setting up an adverse title; and therefore his declarations, and still more his acts, are evidence against such title. It is true (though there are authorities the other way) that, if the question were between the trustees under the deed and the insolvent, declarations or acts by the latter could not be admitted to impeach the deed: but that is upon a principle not applicable here. At all events, the schedule was admissible in evidence for some purposes: as to shew the state of the insolvent's debts and credits, and that he took the benefit of the act, and went through the regular course. If it be said that the evidence was used for other purposes, that was not the objection taken at the trial.

(a) 9 *Bing.* 349.(b) *Moo. & M.* 353.(c) Note to *Vacher v. Cocks*, *Moo. & M.* 355.(d) *Moo. & M.* 338.

R. V. Richards,

R. V. Richards, *contra*. If the evidence was inadmissible, the defendant is entitled to a new trial, though the issue on which it was admitted goes only to part of the demand. The schedule can amount to no more than a declaration made by the insolvent, at the time of his executing it, of the state of his affairs. It is not true that it proves his discharge: that is proved by the order. It proves nothing which was in issue on this record. *Ridley v. Gyde* (a) may require reconsideration: the only safe rule is that a declaration, immediately connected with an act, is admissible to explain the act. Here the evidence offered is of an independent declaration, made after the petition was filed, and therefore more than four months after the execution of the indenture. In *Newman v. Stretch* (b) the declaration was part of the act. The suggestion that there was collusion among the parties is unwarranted: there was no evidence of this, except upon the assumption of the bankrupt's intention; and that was the fact to be proved by the evidence now in question. The objection is strengthened by the circumstance that the party here making the declaration is in truth interested in the result, as he is entitled to the surplus. But even a release of the surplus would not cure the objection.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court. The case relied upon, in answer to the objection here taken, was *Ridley v. Gyde* (a). But there the statement made was in explanation, and, as it were, continuation of the former discourse which led to the

(a) 9 Bing. 349.

(b) Moo. M. & 338.

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 against
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transaction in question. Here the evidence is of something done under the statute, alio intuitu. And, even if this were not so, a contemporaneous declaration may be admissible as part of a transaction, but an act done cannot be varied or qualified by insulated declarations made at a later time.

Rule absolute.

The rule drawn up was, "that the verdict obtained in this cause be set aside, and a new trial had between the parties." The plaintiff gave fresh notice of trial; but the defendant withdrew his pleas and suffered judgment by default; whereupon a writ of inquiry was executed, and the plaintiff had a verdict for 30*l.* 6*s.* 5*d.* The Master, on taxation, allowed the plaintiff his costs of the first trial. This was objected to; but the objection was over-ruled, on the authority of *Jackson v. Hallam (a)*. A summons was obtained to shew cause before a judge at chambers why the Master should not review his taxation; and the learned Judge ordered proceedings to be stayed, to give time for an application to the Court. In *Michaelmas* term 1836, a rule nisi was obtained for reviewing the taxation.

John Jervis, in the same term, *November 25th*, shewed cause. This case comes within the principle of *Booth v. Atherton (b)*, and *Jackson v. Hallam (a)*, in which cases the defendant, after obtaining a rule for a new trial, gave a cognovit, and, the rule being silent as to costs of the first trial, the plaintiff was held entitled to them. No distinction can be drawn, as to this point, between giving a cognovit and suffering judgment by default.

(a) 2 B. & Ald. 317.

(b) 6 T. R. 144.

The rule *Hil. 2 W. 4. I. s. 64. (a)* that, "if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second," was passed for the purpose of assimilating the general practice of the Courts of Common Pleas and Exchequer, as to costs of a first trial (*b*), to the practice of the King's Bench, but not with reference to the particular case arising here. [*Coleridge J.* The rule is laid down more plainly in *Gray v. Cox* (*c*) than in *Jackson v. Hallam* (*d*). In *Sweeting v. Halse* (*e*), where the plaintiff, after failing on the first trial, obtained a rule for a new trial, and then discontinued, *Jackson v. Hallam* (*d*) was recognised as an authority in point.] In *Gray v. Cox* (*c*) the plaintiff, who had obtained a verdict, discontinued upon a new trial being granted; but, as Lord *Tenterden* said in *Sweeting v. Halse* (*e*), where a discontinuance is allowed, the terms are in the discretion of the Court. [Lord *Denman C. J.* No terms had been imposed in those cases: the questions in them arose upon motions to review taxation.]

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 PEACOCK
against
HARRIS.

R. V. Richards, contra. Even in the absence of authorities, the allowance of costs in a case like this would appear unreasonable. But the allowance or disallowance of costs in these cases, which was formerly matter of practice, is now expressly governed by the rule, *Hil. 2 W. 4. I. s. 64. (a)*, and, "when a new trial is granted, and nothing is said about the costs of the first trial, they fall to the ground, as a matter of course:" per *Little-*

(a) 3 B. & Ad. 383.

(b) See *Loader v. Thomas*, 1 Cro. & J. 54.

(c) 5 B. & C. 458.

(d) 2 B. & Ald. 317.

(e) 9 B. & C. 369. note (a).

dale

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against
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dale J. in Newberry v. Colvin (a). Porter v. Cooper (b)
is also an authority against this allowance.

LORD DENMAN C. J. We have no power to allow these costs.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule absolute (c).

(a) 2 Dowl. P. C. 416.

(b) 2 Cro. M. & R. 232. S. C. 5 Tyrwh. 798.

(c) See the next case.

CHARLES FREDERICK, BARON DE RUTZEN, and
MARY DOROTHEA, his Wife, *against* LLOYD.

In case, by the lord of a manor, for disturbance of a market, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor.

CASE for disturbance of the plaintiffs' market at *Narberth*, in *Pembrokeshire*, by setting up another market. Plea, the general issue. On the trial before *Gurney B.*, at the *Pembrokeshire* Spring assizes, 1834, a verdict was found for the plaintiffs, damages 1s., but leave reserved to move to enter a nonsuit. In the ensuing term a rule nisi was obtained, according to the leave reserved, upon grounds which will appear by the judgment of the Court. A rule was also obtained to shew cause why there should not be a new trial, upon

Plaintiff obtained a verdict, and a new trial was granted on account of the admission of improper evidence. Plaintiff drew up the rule for the new trial, and served it on defendant, who informed plaintiff that he would not avail himself of the rule.

The Court ordered that the *postea* should be delivered to plaintiff, and that he should have his costs of the trial.

But the Court allowed neither party the costs of the rule for a new trial, or of the rule for giving the *postea* and costs to the plaintiff.

several

several points, and, among others, upon that taken in *De Rutzen v. Farr* (a), the admission of improper evidence; and upon that ground the rule for a new trial in the present case was made absolute. On the rule for entering a nonsuit, cause was shewn in last *Hilary* term, *January* 23d, by Sir *John Campbell*, Attorney-General, *Cresswell*, and *Evans*, and the rule was supported by *John Wilson* and *E. V. Williams* (b). The case (as regards the point decided) is so fully discussed in the judgment of the Court, that a detail of the arguments is considered unnecessary.

1836.

DE RUTZEN
against
LLOYD.

Lord DENMAN C. J. in this term (*May* 23d) delivered the judgment of the Court.

In this case the Court had directed a rule absolute for a new trial upon a point of evidence, which had been considered in the case of *De Rutzen v. Farr* (a). The counsel for the defendant, however, upon points not decided in that case, have pressed for a nonsuit: it has, therefore, now become necessary to decide them.

It appeared upon the trial that the legal estate in the market in question was not in the plaintiffs; and it was alleged that the legal estate was not deduced to the trustees, upon which it was contended that they alone could have maintained the action, and that, on the present evidence, it would have failed even if brought in their names, on account of the defect in the proof of their title.

As a preliminary answer to these objections, it was urged that this was only a *possessory* action, in which proof of title was superfluous; and that no failure to de-

(a) 4 A. & E. 53.

(b) Before Lord Denman C. J., *Littledale*, *Williams*, and *Coleridge* Js.

1836.

DR RUTHER
against
LEWIS.

duce a regular title from the Crown ought to defeat their right to recover by reason of their possession.

The counsel for the defendant, in reply, did not dispute the general truth of the first of these propositions, but denied that it was applicable under the particular circumstances of the case: and the Court took time to consider of its judgment, for the purpose of looking into the evidence as to those particular circumstances, and the deduction of the title; and after such examination we are of opinion that the rule for entering a nonsuit cannot be made absolute.

It appeared that the *Narberth* market, till the year 1832, had been held in certain places within the town and manor, some descriptions of articles being usually exposed to sale in the streets, but the greater number within and around a market house, standing upon the soil of the defendant; and that the plaintiffs and those whom they represent had received the market tolls, wherever the articles were exposed, while the defendant, and those whom he represents, received stallage in respect of the stalls and standings within and immediately around the market-house (a). In *November*

(a) *Wilson*, in moving for a new trial, contended that the immemorial perception of piccage and stallage by the defendant, concurrently with the taking of tolls by the plaintiffs and their predecessors, ought to have been considered by the jury as raising a presumption that the right to piccage and stallage had at some time been severed from the estate to which the market belonged, and granted, by those whom the plaintiffs represented, to the predecessors of the defendant. And he contended that, assuming a right in the plaintiffs, if no such grant had been made, to remove the market, they could not do so in derogation of the grant; but that the defendant might still carry on the market on the old site. But the Court (Lord *Denman* C. J., *Littledale* and *Patteson* Js.) refused to grant a rule on this ground, Lord *Denman* C. J. observing that the right to piccage and stallage was only a compensation for the use of the soil, and that the enjoyment of it was no restriction on the right of the lord (if otherwise established) to remove the market to a different place.

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1832, the plaintiffs had opened a new market-house, erected by themselves, of convenient dimensions and in a convenient place within the town and manor, upon their own land. The defendant thereupon erected a market-house on the old site, and procured tollable articles to be exposed for sale there on the market day, for which injury the present action was brought: it appeared also that the plaintiffs, and those whom they represent, received payments from the shews standing at the fairs in any part of the town.

Upon this state of facts the counsel for the defendant contended that, as all the evidence of possession down to 1832 applied to a perception of tolls in the old market-house, and the places before used, the only inference of right thence to be drawn was of a right to hold the market *there*; and that it became necessary, in order to shew the market, in the place in which it was now held, to be legal, that a grant from the Crown should be produced authorising the removal. A charter was accordingly produced, giving the right to hold the market any where within the manor, to which, according to the doctrine of *Curwen v. Salkeld* (a), the right of removal would be incident. But then it was contended that this would avail nothing to the plaintiffs, because they failed to connect themselves with it by a regular deduction of title.

Unless, however, the first of these points be correctly made, the second is immaterial; the question therefore will be, whether, from the evidence of a market immemorially held in certain places within a manor by the apparent lord of such manor, and those whom he represents as

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such, the necessary legal inference be that of a grant restrictively to hold it in such places only, and with no power of removal; or whether those facts are not premises from which a jury may properly infer a grant of the market to be held in any convenient place within the manor, and, of course, with the power incident thereto of removal from time to time. If the latter be the proper answer to this question, the present finding of the jury may, as regards this point, be sustained.

The object of the inquiry would be to determine the extent and terms of the grant, the mere existence of which was already inferred from the user, all consideration of the charter actually produced, and of the defective title, being by the argument excluded. Now, in conducting this inquiry, the jury would properly consider the character of the grantee, the lord of a manor, the nature of the thing granted, a market, and its object, the grantee's profit, and the general convenience of the residents and the vicinage. Considering these, it appears to us the most reasonable conclusion of fact to be drawn, that the grant, whenever or by whomsoever made, had been of a market to be held generally, that is, at any convenient place within the manor. And if, upon the considerations just stated, that would be the reasonable conclusion to be drawn, we cannot see that it is necessary or even proper to infer a restriction upon the grant from the fact that the market appears always to have been held on any particular spot or spots within the manor. It is true that, where a grant is to be inferred from user alone, its extent as between the grantor and grantee is, in many instances, limited by the extent of the user, for it is not to be presumed against him that he has granted more than he appears to have permitted the

the grantee to enjoy. But, even in such cases, we think the jury would be warranted in finding a grant, including all such terms as are usual and reasonable incidents to a grant of the description inferred. In the present case, however, where the jury is called upon to determine, not merely the existence of a grant from the Crown, but the terms of the particular grant in question, we do not see how they can forbear to take into account every circumstance legitimately tending to affect the probabilities of the case; and, if those circumstances point to wider limits than the mere user has extended to, but which are not inconsistent with such user, the jury may, indeed ought, to conclude in favour of such limits.

This reasoning will be found to be directly sanctioned by a well considered authority, the case of *Rex v. Cotterill* (a). A material point there to be decided was, whether the corporation of *Walsall* had rightfully removed their market from the *High Street*, in which it had been holden immemorially, to a new market-house. There, as here, no charter was produced, giving a market within any prescribed limits; but a charter of *Ch. 2.* granted "all and all manner of liberties, franchises, immunities, privileges, jurisdictions, *markets*, and hereditaments, *which the mayor and commonalty*" "*now hold, use, and enjoy, or have held,*" &c. What then was the market enjoyed at the date of the charter — a market to be held in the *High Street*, and so irremoveable from it, or one to be held within the borough, and so removeable to any convenient spot within it? That was the question —

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which, in terms, the charter threw no light upon ; and it was argued, as here, that the user alone was to determine it. The Court, however, held the other way, the different members attaching different degrees of weight to particular circumstances, but all agreeing in the principle that all the circumstances were to be taken into account, and no limits to be implied but such as might fairly be deduced as probable inferences from all those circumstances.

In that case some reliance is placed by the Judges on the fact, that the grantee of the supposed charter was a corporation and not an individual : that, however, was a fact only *increasing* the probability of a grant co-extensive with the borough : we are now only considering whether there was *any* evidence of a grant co-extensive with the manor : it is unnecessary, therefore, to observe that *Abbott J.* seems to consider that an equal probability exists of a grant to the lord being co-extensive with the manor, as of a grant to a corporation being co-extensive with the borough.

We entirely agree with this case ; and we think that the learned Judge not only was not called upon to nonsuit the plaintiffs, but, upon this evidence, and as to this point, would have been justified in directing the jury that, if they were satisfied of the existence of the grant, it was most probably a grant to be exercised any where *infra manerium*.

It becomes, therefore, unnecessary to consider the second point, or to examine whether, if established in fact, it would have led to the consequences insisted on by the defendant ; because the plaintiffs might have rested on their possessory evidence, and are not to be
pre-

prejudiced by having attempted and failed to make out a documentary title by purchase. The rule, therefore, will remain absolute in its original terms.

Rule as to entering a nonsuit, discharged.

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The rule for a new trial was drawn up (without mention of costs) (*a*), and the agent for the plaintiffs, on *May* 26th following, served it on the agent for the defendant, who, on *June* 4th 1836, wrote to the plaintiffs' agent as follows:—"My client will not avail himself of the privilege granted by the Court of a new trial in this cause, the points relating to the nonsuit having been decided against him."

In *Michaelmas* term, 1836, *Evans*, on affidavit of the above facts, obtained a rule to shew cause why the rule for a new trial should not be discharged, and the postea delivered to the plaintiffs, and why the plaintiffs should not be at liberty to sign judgment and tax their costs thereupon. In *Trinity* term following, *June* 9th, 1837,

E. V. Williams shewed cause. The Plaintiffs are not entitled to the costs of the trial. By the rule, *Hil.* 2 *W.* 4. I. 64. (*b*), "If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second." Here the rule made no mention of costs: the plaintiff, therefore, could not have obtained the costs of the first trial, whatever the event

(*a*) It was assumed, in the argument and judgment, that the rule was drawn up by the plaintiffs, though the fact was not expressly stated on affidavit.

(*b*) 3 *B.* & *Ad.* 383.

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of the second trial had been. The defendant, by not insisting on the second trial, cannot be placed in a worse situation than if he had proceeded to trial and failed. And, if this rule be discharged, the plaintiffs will be placed in as good a situation as if they had succeeded on a second trial. They keep the verdict without additional expense, the defendant having taken the least vexatious course. Even if the defendant had formally withdrawn his plea, the plaintiffs could not have had the costs of the first trial: that was decided in *Peacock v. Harris* (a), though the Master had there taxed the plaintiff the costs of the first trial on the authority of *Jackson v. Hallam* (b). The plaintiff, without the second trial, has no locus standi as to taxation: he is setting aside the deliberate act of the Court on an admission in pais.

Cresswell contra. After the letter, the defendant could not be allowed to carry the cause down to a second trial. It is, therefore, as if the rule had never been made: for, although, to expedite the cause, the plaintiffs have had it drawn up, it is now renounced by the successful party. Then the defendant, having expressly waived his right to get rid of the effect of the first trial, endeavours to deprive the plaintiffs of the benefit of the postea. In *Peacock v. Harris* (a) the defendant insisted upon his rule, and did not withdraw his pleas till the plaintiff had given him notice of the second trial: then he suffered judgment by default, and a writ of inquiry was executed. In that case, therefore, the rule for a new trial was carried into effect: here it is abandoned. It is as if the defendant, when the Court

(a) Antè, p. 454. S. C. 1 N. & P. 240.

(b) 2 B. & Ald. 317.

granted

granted the rule, had refused it as granted (a). In *Smith v. Haile* (b) there was a special case stated; but, the case not being considered sufficiently stated, a new trial was ordered; and the new trial was actually had: there the successful party was not allowed the costs of the first. That was not like the present case: and in *Booth v. Atherton* (c) (which was decided soon after *Smith v. Haile* (b)), where also a new trial was ordered on account of the insufficiency of a special case stated on the first, but the defendant gave a cognovit instead of going to trial, the plaintiff was allowed the costs of the original trial. In *Bird v. Appleton* (d), where the party succeeding on the second trial was not allowed the costs of the first, a new trial was actually had. In *Robertson v. Liddell* (e) the defendant obtained a verdict; then a new trial was ordered on matter of law; but the parties agreed to state a special case, as if reserved at the trial; upon which case the Court awarded the postea to the plaintiff: and then the costs of the plaintiff were taxed as if the case had been reserved at the first trial; and this Court sustained the taxation. That case, and *Booth v. Atherton* (c) and *Jackson v. Hallam* (g), shew that, even if the defendant here had adopted the rule, and then given up the cause, as in *Peacock v. Harris* (h), the plaintiff would have been entitled to the costs of the first trial. If the defendant had applied to withdraw his plea, he must have done so upon terms; and the Judge would then have exercised a discretion as to the costs.

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(a) See *McDougall v. Nicholls*, 3 A. & E. 813.

(b) 6 T. R. 71.

(c) 6 T. R. 144.

(d) 1 East, 111.

(e) 10 East, 416.

(g) 2 B. & Ald. 317.

(h) Antè, p. 454. S. C. 1 N. & P. 240.

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LORD DENMAN C. J. My first impression was that the defendant had placed himself in the same situation as if there had been no rule; in which case the plaintiffs would have been entitled to the costs of the trial. I must say that my opinion fluctuated much during the argument. It seems hard that the defendant should be in a worse situation when he declines to go to trial than if he had gone to trial and failed. The case is not easily distinguished from *Peacock v. Harris (a)*. But, as the plaintiffs drew up the rule, and the defendant abandoned it, it seems to me that my first impression was right, and that the case stands as if there had been no rule. The plaintiffs therefore must have their costs of the trial.

LITLEDAL J. This rule must be absolute in the terms in which it was moved. The defendant abandons his rule for a new trial, not expecting that he shall be able to make an effectual defence. Had he gone to trial, and failed, there would have been no costs of the first trial. But look at the position of the parties. If the defendant had never made the application, the plaintiffs would have had the costs of the trial: are they to be in a worse situation when a new trial is moved for and the rule abandoned? In *Peacock v. Harris (a)* the parties were prepared to go to a second trial; but, for some reason, the defendant was permitted to withdraw his pleas. We do not know whether that was allowed on terms of paying costs (b). At any rate, the record had assumed a new position.

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(a) *Anté*, p. 454. *S. C. 1 N. & P.* 240.

(b) It appears, by one of the affidavits in that case, that, after giving notice of trial, the plaintiff had obtained a rule for a special jury, and an appointment had been served to reduce the jury, when the summons was served

PATTESON J. The defendant, having obtained the rule for the new trial, was the proper party to draw it up. If neither had drawn it up, there would of course have been no rule; and then the plaintiffs must have had the costs of the trial. But the plaintiffs, for the sake of expedition, drew up the rule; and then the defendant says he will not avail himself of it. The plaintiffs then require to be placed in the same position as if they had not unnecessarily drawn up the rule. In *Peacock v. Harris* (a) the rule was in fact drawn up by somebody, and acted on. Notice of trial was given, and application made to withdraw the pleas, and granted. That was a matter of favour, not of right; and it may be looked upon as a sort of bargain, in which the defendant did not submit to more than he would have been liable to if a new trial had been had, and a verdict found against him. *Robertson v. Liddell* (b) was a different case. There the parties, instead of going to a new trial, agreed to let matters stand as if the special case had been reserved on the first trial. *Jackson v. Hallam* (c), indeed, goes further, and seems inconsistent with *Peacock v. Harris* (a).

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WILLIAMS J. The circumstances are peculiar; and I have felt much difficulty. By the practice of this Court, before and since the rule of *Hil. 2. W. 4.*, the plaintiff, if he succeeded on both trials, would not have had the costs of the first, no mention being made of them in the

served to shew cause why defendant should not be at liberty to withdraw his pleas; that on the attendance upon such summons, the plaintiff's attorney contended that the defendant should pay the costs of the special jury; but the order was made generally, that the defendant be at liberty to withdraw his pleas.

(a) *Ant.*, p. 454. *S. C. 1 N. & P.* 240.

(b) 10 *East*, 416.

(c) 2 *B. & Ald.* 317.

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rule for a new trial. It seems therefore hard that a defendant, by abandoning his defence, and declining a vexatious resistance, should be in a worse position than if he had insisted upon it and failed. But, as he has not acted upon his rule at all, the case stands as if the defendant had never applied for a new trial.

Rule absolute (a).

(a) No costs of either rule were given.

Monday,
June 13th.

The KING *against* MARSH.

(Case of ALKINGTON Poor Rate.)

A parish was divided into four tithings, *A., B., C., and D., A.* containing the parish church. Each titling maintained its own poor, and each had a churchwarden,

ON appeal by *John Marsh* against a poor-rate for three pieces of land, signed by the churchwarden and overseers of the poor of the titling of *Alkington*, in the parish of *Berkeley*, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

elected at a vestry of the parish in general, but from and by its own inhabitants. The minute of appointment included all the four, and stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them and each of them, "truly to execute the office of churchwarden within your parish." None ever acted out of his own titling, unless in signing the annual presentments to the archdeacon of the state of the church, &c. Each of the tithings (except *A.*, which was exempt) raised its own church rate, and paid it to the vestry clerk; and he kept a separate account for each churchwarden, who accounted with the inhabitants of his own titling.

A commissioner of inclosure under a local act and the general act, 41 G. 3. c. 109. s. 8., made an order settling the boundaries between the above parish and another parish adjacent, and adjudging certain lands to be in the latter; and he, within a month, served a description of the boundaries on a party then acting as churchwarden of titling *A.* Until the order, the lands in question had been rated to titling *B.*

On appeal against a poor rate made upon the above lands as situate in titling *B.*, notwithstanding the commissioner's order:

Held, that the description of boundaries had been sufficiently served according to the proviso of stat. 41 G. 3. c. 109. s. 3., requiring such description to be served upon "*one of the churchwardens or overseers of the poor of the respective parishes.*"

Although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted.

Held, also, that the sessions had acted rightly in rejecting evidence offered to shew that the commissioner, in his inquiry into the boundaries, had not conducted his examination in the manner required by stat. 41 G. 3. c. 109. s. 3.

The

The question was whether the lands were in the tithing of *Alkington*, or in the parish of *Leonard Stanley*. Up to 17th November 1832 they had been rated to *Alkington*. An act was passed, 11 G. 4. (a), (which was to be taken as part of this case) for the inclosure, inter alia, of lands in the parish of *Leonard Stanley*; and it recited the General Inclosure Act, 41 G. 3. c. 109. The commissioner appointed under it made the following determination, with reference to the boundaries of the parishes of *Berkeley* and *Leonard Stanley*, on the 17th of November 1832.

"Whereas by an act passed" 11 G. 4., "entitled an act for enclosing lands in the parishes of *Stanley St. Leonard's*, otherwise *Leonard Stanley*, and *Eastington*, or one of them, in the county of *Gloucester*, and for discharging from tithes lands in the said parish of *Stanley St. Leonard's* otherwise" &c., "I, the undersigned *Daniel Trinder*, was appointed commissioner for carrying the said act into execution; and whereas disputes or doubts having arisen whether certain old inclosures called respectively *The Ham*, *The Langgett*, and *Motford*, (all of which are part of the estate of the Rev. *Thomas Heberden*, and are in the occupation of *John Marsh*, as his tenant,) are parcel of the parish of *Stanley St. Leonards*," otherwise" &c., "or of the parish of *Berkeley*: I the said *D. T.*, in pursuance of the powers and in compliance with the provisions contained in the said act and the therein recited act, have ascertained the boundaries of the said parishes respectively where they adjoin each other: Now, therefore, I the said *D. T.* do hereby set out, determine, and fix that the said inclosures respectively

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are parcel of the parish of *Stanley St. Leonard's*, otherwise" &c., "and that the boundary fences of the said inclosures respectively are the boundaries between the said parish of *Stanley St. Leonard's*, otherwise" &c., "and the said parish of *Berkeley*, where they adjoin each other.

(Signed) *Daniel Trinder.*"

The sessions thought that under stat. 41 G. 3. c. 109. s. 3. (a) it was necessary to have proof that the means of appeal had been afforded by a due service of the descriptions of boundaries as therein provided, but that, if this were done, no appeal having ever taken place, they could not now enquire by what means and through what steps the commissioner had arrived at his decision; and they interrupted evidence which had been commenced on that point, particularly as to his having examined witnesses without oath, and as to whether there had been any disputes, before his perambulation commenced, concerning the boundaries in question.

With regard to the proper services of the description of boundaries: *Berkeley* parish is divided into four tithings, *Berkeley town*, *Alkington*, *Ham*, and a fourth composed of *Hinton*, *Hamfallow*, and *Breadstone*. There is but one church, which is in *Berkeley*, and one chapel of ease, which is in *Ham*. Each of the tithings has separate poor-rates, and manages its poor separately, and removes paupers from one tithing to another. *Berkeley*, *Alkington*, and *Ham* have each one churchwarden and two overseers. *Hinton* and *Hamfallow* have one overseer each, and *Breadstone* two, and there is one churchwarden for the three. The churchwardens

(a) See page 473. note (e), post.

for all are appointed at *Berkeley*. The following is the form of the appointment.

At a vestry meeting held in the vestry room of the parish church of *Berkeley*, this day of , the following persons were nominated as proper persons to serve the office of churchwardens for the town and tithings for the year ensuing, viz. *A. B.*, *C. D.*, *E. F.*, *G. H.* In the presence of us (Here follow the names of the parishioners assembled in vestry).

The outgoing churchwarden generally nominates his successor for the same tithing; but, in case of dispute, inhabitants of one tithing do not vote in the election of the churchwarden of another. None are chosen churchwardens of either of the tithings but such as are inhabitants of that particular tithing. *Berkeley* church is repaired by church rates levied separately on the tithings.

The description of boundaries was served, 23d November 1832, by the commissioner, duly as regarded the parish officers of *Leonard Stanley* and the lords of the manors, but not on any churchwarden or overseer in respect of *Alkington* as distinct from the rest of the parish of *Berkeley*. It was served on one *Seaborne*, who had been duly elected churchwarden of *Berkeley* town for the preceding year, but whose original year of office was expired, and who continued to act in consequence of the person appointed as his successor not having been sworn in, or served.

The questions were, 1. Whether the quarter sessions ought to have received evidence as to the steps taken by the commissioner, and the other circumstances prior to his adjudication? 2. Whether they were entitled to require proof of the due service of the de-

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scription of boundaries? 3. Whether, if so, service on the churchwarden of *Berkeley* was sufficient? 4. Whether *Seaborne* could be considered as such churchwarden?

The case came on for argument in last *Hilary* term (a).

Sir *J. Campbell*, Attorney-General, and *Greaves*, in support of the order of sessions. The rate is correctly imposed on the appellant's lands as lying in *Alkington*, unless it be conclusively shewn that the commissioner made a valid order, fixing them in *Leonard Stanley*. He acted on a limited authority, and was bound (upon the principle recognised in *Bruyeres v. Hakcomb* (b)) to perform strictly the conditions under which it was to be exercised. The authority in question is given, and the conditions prescribed, by stat. 41 G. 3. c. 109. s. 3 (c). Then, first, the order is void,

AS

(a) *January* 27th. Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* J.

(b) 3 A. & E. 381.

(c) Stat. 41 G. 3. c. 109. s. 3., after reciting that "disputes or doubts may arise, concerning the boundaries of parishes, manors, hamlets, or districts, to be divided and inclosed, and of parishes, manors, hamlets or districts, adjoining thereto," enacts that the commissioner under any inclosure act shall, and he is thereby authorized and required, to enquire into such boundaries by examination on oath or affirmation, and by such other legal ways and means as he shall think proper; and, if it shall appear to him that the boundaries are not then sufficiently ascertained, to ascertain and determine the same. "Provided always, that such commissioner or commissioners (before he or they proceed to ascertain and set out the boundaries of such parishes, manors, hamlets, or districts) shall, and he or they is and are hereby required to give public notice, by writing under his or their hands to be affixed on the most public doors of the churches of such parishes, and also by advertisement to be inserted in some newspaper to be named in such act, and also by writing to be delivered to or left at the last or usual places of the abode of the respective lords or stewards of the lords of the manors in which the lands

and

as it does not shew, on the face of it, that the conditions have been fulfilled; *Rex v. Croke* (a). Secondly, if this be not so, still the parties relying on the order were bound to prove the performance of all the conditions. And, thirdly, at all events, the opposing party was at liberty to impeach the proceedings, by shewing that the directions of the statute had not been complied with, so as to make the act of the commissioner a lawful exercise of jurisdiction; *Welch v. Nash* (b). But the appellant, here, was prevented from giving evidence for that purpose. The description of boundaries in this case was not served upon one of the "churchwardens or overseers" of the poor of *Alkington*, as it ought to have been. The only service was on *Seaborne*, who had been churchwarden of *Berkeley* town. *Alkington* was a district separately maintaining its own poor, and for the present purpose a distinct parish. And *Seaborne* was not even churchwarden of *Berkeley* town at the time of the service.

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and grounds to be inclosed shall be situate, and of such adjoining manor or manors, ten days at least before the time of setting out such boundaries, of his or their intention to ascertain, set out, determine, and fix the same respectively; and such commissioner or commissioners shall, within one month after his or their ascertaining and setting out the same boundaries, cause a description thereof in writing to be delivered to or left at the places of abode of one of the churchwardens or overseers of the poor of the respective parishes, and also of such respective lords or stewards." It is further provided, that, if any person "or persons interested in the determination of the said commissioner or commissioners respecting the said boundaries shall be dissatisfied" with the order, he or they may appeal to any general quarter session for the county, to be holden within four calendar months "next after the aforesaid publication of the said boundaries, by delivering or leaving such description as aforesaid;" and the decision of the justices shall be final, and not removeable by certiorari or otherwise.

(a) 1 Cowp. 26.

(b) 8 East, 394.

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W. J. Alexander and Cripps, contra, were then called upon by the Court as to the service. Stat. 41 G. 3. c. 109. s. 3. requires the notice, after setting out the boundaries, to be delivered to "one of the churchwardens or overseers of the poor of the respective parishes." That has been literally obeyed. With nothing but this clause to guide him, the commissioner could serve the description of boundaries on the churchwarden only of the mother church. The notice, previous to ascertaining the boundaries, is to be fixed upon the doors of the parish churches: the parish church of *Alkington* is in *Berkeley*. According to *Spitalfields v. Bromley* (a), and *Patteson J.* (referring to that case) in *Rex v. Bishop Wearmouth* (b), magistrates in making an order of removal are not bound to notice the divisions of parishes into townships maintaining their own poor; à fortiori, a commissioner under the Inclosure Act is not called upon to observe them. Stat. 43 Eliz. c. 2. s. 9. preserves the authority of churchwardens over the whole parish, although there may be districts within it, which, for some purposes, have jurisdictions of their own; and the section was construed accordingly in *Rex v. Gordon* (c). [*Coleridge J.* That section does not apply here. The service here is made necessary by a distinct act of parliament, for a purpose not contemplated by the former act.] Churchwardens are representatives of the body of the parish; 1 *Bla. Com.* 394.; and they are sworn to execute their office within the parish generally. [*Coleridge J.* That is said of the churchwardens of a parish.] There is

(a) 18 Vin. Abr. 468, *Removal*, (H), pl. 5.

(b) 5 B. & Ad. 942.

(c) 1 B. & Ald. 524.

no prescribed oath for a churchwarden of a township or tithing. The churchwardens of the district in which the parish church is have the charge of the registers. The parish chest is in their care: the indenture of an apprentice bound in one of the townships would come from their custody. It is sufficient here if the churchwarden of *Berkeley* was one of several persons, any one of whom might properly have been served. The case finds that *Alkington* and other tithings have each one churchwarden; and there may be a custom that each of the several tithings which make up the parish should elect one. But it does not follow that each acts only for his own tithing; or that, if the churchwarden of *Berkeley* were ill, the churchwarden of *Alkington* would not be compellable to act in his place. [*Williams J.* If you contend that the churchwarden of one of these districts may act in any other throughout the parish, *Rex v. Nantwich (a)* is against you.] That case was decided with much doubt; and the only point determined was that stat. 13 & 14 *Car. 2. c. 12. s. 21.* was not controuled by the certificate acts subsequently passed. The difficulty which arose in that case was removed shortly afterwards by stat. 54 *G. 3. c. 107. s. 2.* There can be no exercise of the office of churchwarden with reference to a township, except for execution of the poor-laws. The office is properly one having relation to a parish church; and in *Rudd v. Morton (b)*, where the question was whether *Stratton* was a reputed parish of itself or part of the parish of *Biggleswade*, it was held that, to make it a reputed parish within stat. 43 *Eliz. c. 2.*, it must have had "a parochial chapel,

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(a) 16 *East*, 228.(b) 2 *Salk.* 501.

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and chapelwardens" at the time when the statute passed; and because *Stratton* "had but one chapelwarden whose office it was to collect the rates taxed upon *Stratton*, and pay them to *Biggleswade*," it was held part of *Biggleswade*, and not a reputed parish within the statute of *Elizabeth*. Here the townships and tithings in question make up the whole of the parish; and the several churchwardens were the churchwardens of the parish. [Lord Denman C. J. It is objected, not only that *Seaborne* was not the right person, but that his year was out.] By the 118th canon (a) (cited in 1 *Burn's Eccl. Law*, 410. 8th ed. tit. *Churchwardens*), "the office of all churchwardens and sidesmen shall be reputed ever hereafter to continue until the new churchwardens that shall succeed them, be sworn." In practice this is so. And *Seaborne*, while churchwarden, would be overseer of *Alkington*, ex officio. [*Greaves* referred to an *Anonymous* case (b), 1 *Ventr.*, as shewing that the canon, as to churchwardens, had been overruled, and that a churchwarden was in office, for the purpose of acting, before he was sworn; to which point he also cited *Rex v. Corfe Mullen* (c). Lord Denman C. J. The case in *Ventris* only shews that the canon may be overruled by custom. *Littledale* J. And that a churchwarden may execute his office before he is sworn. In *Com. Dig. Eglise* (F. 1.), it is said that, "By the canon 1 *Jac.* 89.(d), they shall continue in office but one year, except chosen again in like manner. But, by can. 118(a), they shall be reputed to continue till new churchwardens sworn.]"

(a) 2 *Gibb. Cod.* 962.(b) 1 *Ventr.* 267.(c) 1 *B. & Ad.* 211.(d) 1 *Gibb. Cod.* 215.; and see note (g), *Ibid.*

The *Anonymous* case (a) in *Noy*, cited 1 *Ventris*, 267, does not authorise the position that the 118th canon has been overruled. In *Prideaux's Directions to Churchwardens*, 61, 2. (b), it is said that churchwardens can do no legal act as such till they are sworn.

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As to the preliminary acts not mentioned in the order, it must now be presumed that they were rightly done, the time for appeal having been suffered to elapse. In *Rex v. St. Mary in Bury St. Edmund's* (c) the commissioners' award was not denied to be conclusive evidence as to the state of boundaries from the time of making the award. *Rex v. Whiston* (d) shews that any question as to notices not mentioned in the order is now too late, no negative evidence being given, as in *Rex v. Haslingfield* (e), to counteract the presumption that all was done regularly. In *Rex v. Croke* (g), the act of parliament was of a different nature from the present, and more directly affecting private property.

Greaves, in support of the order of sessions, was then desired to proceed. Stat. 41 G. 3. c. 109. s. 3. clearly intended that the service should be upon persons interested in the determination. The words requiring service on "one of the churchwardens or overseers of the poor of the respective parishes," must contemplate persons who can, in some instance at least, have a joint interest. The churchwarden of *Alkington*, and the overseer of *Alkington*, have such a joint interest with respect

(a) *Noy's Rep.* 139.

(b) 10th ed.

(c) 4 B. & Ald. 462.

(d) 4 A. & E. 607. And see *Rex v. Witney*, antè, 191.

(e) 2 M. & S. 558.

(g) 1 Cowp. 26.

1836. to the poor; but the churchwarden of *Berkeley* has no joint interest with the overseer of *Alkington*: churchwardens of a parish have no right of interference with the poor of individual townships within the parish: *Rex v. Clifton* (a), *Rex v. Nantwich* (b). Enactments have been made expressly enabling overseers appointed in townships to do the duty of churchwardens there; 2 & 3 Ann. c. 6. s. 3.; 17 G. 2. c. 38. s. 15. The authority of *Spitalfields v. Bromley* (c) has been much shaken. In *Rex v. Bishop Wearmouth* (d) Lord Denman C. J. held that the removing magistrates ought to have sent the paupers to that township, in the parish of *Bishop Wearmouth*, which was bound to maintain them. Stat. 43 Eliz. c. 2. s. 9. does not apply to a parish in which there are several districts maintaining their poor, under stat. 13 & 14 Car. 2. c. 12. s. 21. [Coleridge J. Upon whom do you say the service here ought to have been?] Notice should have been given to some person representing the parish officers of *Alkington*. The appeal against the order is given to "any person interested." If it be sufficient to serve the description of boundaries upon the churchwarden of any one of these districts, it might be given to a party whose district was not affected by the proceeding, and who, therefore, had no interest in communicating the notice; or even to a party interested in withholding it. [Littledale J. The act, in prescribing the notice, seems not to contemplate any particular description of interest in the parties who are to be served; but to regard them merely as public officers. The interests contemplated seem to be those which commoners and others may have in the lands themselves.]

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(a) 2 East, 168.

(b) 16 East, 228.

(c) 18 Vin. Abr. 468, Removal, (H), pl. 5.

(d) 5 B. & Ad. 942.

The power of appeal depends on the service of notice, because the time for appealing is limited to four months next after publication of the boundaries.

As to the objection that *Seaborne's* year had expired. He was not de jure churchwarden, but his successor was. Two persons cannot be in of the same office; and if a man may execute the office of churchwarden before he is sworn, as was held in the *Anonymous* case in *Ventris* (a), and in *Rex v. Corfe Mullen* (b), it is only because he is in of such office. The canon is, inferentially, over-ruled by the later authorities. Churchwardens are a lay corporation, existing independently of the canons, by common law; *Dawson v. Fowle* (c), *Stutter v. Freston* (d), *Catten v. Barwick* (e). Swearing is a proper sanction introduced by canon, but not necessary to the lawful holding of the office. The appointment, here, is "for the year ensuing."

As to the preliminary proceedings, *Rex v. St. Mary in Bury St. Edmunds* (g), does not shew that any irregularity in them might not have been inquired into at the sessions. In that case it was not suggested that the proceedings of the commissioners had not been regular.

Lord DENMAN C. J. This is a question of great difficulty, and important in its consequences; and we wish the case restated so as to afford us more information as to the appointment of these officers, their oath, and the limits within which they act.

(a) 1 *Ventr.* 267.

(c) *Hardr.* 378.

(e) 1 *Stra.* 145.

(b) 1 *B. & Ad.* 211.

(d) 1 *Stra.* 52.

(g) 4 *B. & Ald.* 462.

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The Court directed

That the orders returned with the writ of certiorari in this prosecution be sent back to the sessions to be restated, this Court wishing to know, — Whether any custom prevails as to the election of parochial officers within the parish of *Berkeley*, and what is the precise form of their appointment, and the form of the oath of office taken by them; and also whether any of the officers act out of the tithings for which they are respectively appointed. In answer to these inquiries, the following addition was (by consent) made to the case: —

1. By custom in the parish of *Berkeley* (divided as it is into the several tithings as mentioned in the case), there are four churchwardens, the customary mode of electing whom is as follows. A notice is given in the parish church that the churchwardens desire a meeting at the vestry on *Easter Tuesday* to choose churchwardens for the town and tithings for the year ensuing. At the meeting held in pursuance of such notice an inhabitant of each tithing is separately proposed and nominated as the new churchwarden for such tithing. The churchwarden for the tithing of *Alkington* is usually nominated first in order, and afterwards the rest one after another. It is customary for the outgoing churchwarden of each tithing to propose his successor; and the person so proposed is usually nominated without opposition; but, in case of opposition, the successor is nominated by the majority of the inhabitants, then present, of the tithing for which he is to serve, in which nomination the inhabitants of the other tithings never interfere. As far as living memory goes, each churchwarden has been an inhabitant of the tithing for which he served.

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2. After the nomination of the churchwardens as aforesaid, a minute thereof is usually made, in the form set out in the case, for presentation to the archdeacon at his annual visitation. No other minute or appointment is made or delivered to any of the churchwardens.

3. They are all sworn in together at the archdeacon's visitation. The oath administered is in the following form:—"You and each of you shall swear truly and faithfully to execute the office of churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm, so help you God and the contents of this book."

4. No churchwarden ever acts out of the tithing for which he is appointed, except the signing the presentments annually made to the archdeacon of the state of repair of the church and other presentable matters, which are signed by all four churchwardens, can be so considered. There is no church rate made for the tithing of the town of *Berkeley*; but the church is repaired by rate out of the other tithings. When a sum of money is required for other expenses towards which the church-rate is applicable, the parish clerk, who is also vestry clerk, divides the amount required into three equal parts, and makes a separate rate for each of the three other tithings for one third, although the extent and value of such tithings are not equal. Such rate is allowed by the inhabitants of each of such tithings in vestry. The rate, when collected, is paid to the vestry clerk, who keeps separate accounts for each of the churchwardens of such tithings, and such accounts are allowed by the inhabitants of each of such tithings.

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The case was further argued in this term (a).

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Sir *J. Campbell*, Attorney-General, and *Greaves*, in support of the order of sessions. It is clear, from the facts now stated, that *Seaborne* could not be considered as churchwarden for *Alkington*. *Berkeley* town, for which he acted, had no interest in the church-rate, nor in the *Alkington* poor-rate; and the removal of these lands tended to burthen *Alkington* more severely in respect of both. The custom now stated, that the church should be maintained by three of the tithings and not the fourth, may well have had a legal origin. The lord, when he endowed the living, might appropriate to this purpose such revenues as he thought fit. It may be said that *Seaborne* was at all events a churchwarden "of the parish," within the letter of the statute. But the election is by the inhabitants of each tithing separately, for that tithing, and the written appointment is framed accordingly. The officer of each township, therefore, is a churchwarden in, not of, the parish. The argument on the other side rests upon a strict construction of the word "parish," as signifying the district which comprehends the lesser divisions. But the recital of 41 G. 3. c. 109. s. 3. refers to the settlement of disputes as to boundary, not only between parishes, but between manors, hamlets, and other districts; and therefore there must be cases in which the clause as to notice will refer to officers of divisions less than parishes. And the word "parish" has often been construed in the less comprehensive sense. In stat. 43 Eliz. c. 2. s. 3., it has been held applicable to villis;

(a) June 4th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams* Js.

Anonymous

Anonymous case, Foley, 35. (a). According to the argument on the other side, if a district were extra-parochial, no notice would be necessary. The intention of the statute must be looked to, which is, that warning should be given to the parties interested. The principle of construction should be that which was adopted in *Saunders v. Wakefield (b)*, where the word "agreement," in the latter part of stat. 29 Car. 2. c. 3. s. 4., was held to be a word of reference, carrying on, by implication, the words "special promise," "contract," &c., which occur in the earlier part.

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W. J. Alexander and Cripps, contra. There is nothing in the form of appointment to shew that the party is churchwarden for one township rather than another. In *Saunders v. Wakefield (b)* the word "agreement" formed part of the same sentence with the other words which (perhaps by a strained construction) were read as connected with it. Here the frame of the clause is different. If the churchwardens of the several districts are not all churchwardens of the parish generally, to whom must notice be given under the act? The officer for the division which has the mother church and the parish chest will still be the fittest person. Publicity, the object for which the notice is required, will be best attained by service on him. [*Patteson J.* In drawing this act, it has been forgotten that parishes might contain districts maintaining their own poor. Upon what overseers should the notice be served in such a parish?] The commissioner, in this case, was bound to follow the words of the act as nearly as he could; and he has taken

(a) *Foley's Poor Law*, 3d ed.

(b) 4 B. & Ald. 595.

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the course best calculated, consistently with the act, to make this notice public to the people of *Alkington*. The question raised in *Rex v. Nantwich* (a), as to the jurisdiction of churchwardens over the poor of townships, is entirely distinct from that now before the Court. It would be very inconvenient to require that a commissioner of inclosure should ascertain who were the district officers, for the purpose of giving his notices. But, further, it has not been shewn that *Seaborne* was not, in point of law, a churchwarden for the whole parish, or that there can be churchwardens for anything less than a parish. In the present case all the churchwardens make joint presentments to the archdeacon. All form one body corporate. The office of churchwardens existed long before the statute 43 *Eliz. c. 2.*, and is not affected by its provisions; nor is there any statute by which the extent of their jurisdiction has been limited. Assuming the mode of election in these townships to be good, the churchwardens are not the less officers for the whole parish. It is said in *Dawson v. Fowle* (b) that, "of common right, every parish ought to choose their own churchwardens: but because the manner of election varies and is uncertain, a custom may be alleged: and issue may be taken, whether a special and select vestry, or the whole parish, ought to choose their churchwardens." But the mode of election, whatever it may be, will not affect the extent of the jurisdiction. The proviso of 41 *G. 3. c. 109. s. 3.*, as to serving notice of boundaries, does not make that service a necessary condition precedent to the order becoming valid. It is a direction to the commissioner.

(a) 16 *East*, 228.(b) *Hardr.* 378.

[Lord Denman C. J. The time for appeal depends upon it, by the next proviso.]

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Cur. adv. vult.

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LORD DENMAN C. J. now delivered the judgment of the Court.

The question in this case has arisen out of the ascertainment of boundaries between certain parts of the parish of *Berkeley* in the county of *Gloucester* and the parish of *Leonard Stanley* in the same county, under the third section of 41 G. 3. c. 109 (the General Inclosure Act), by a commissioner acting under it, and an act of 11 G. 4. for the inclosure of the parish of *Leonard Stanley*. And it seems to us that the difficulty, which has arisen, is not attributable to any error or misconduct of that commissioner, but to the imperfection and confusion of the General Inclosure Act itself.

It certainly would seem probable that the settlement of boundaries would be equally useful and necessary in the case of an inclosure taking place in or adjoining to parishes divided into many districts, as where a parish consists of one undivided district. And, accordingly, the earlier part of the third section recites, that disputes may arise respecting the boundaries of "parishes, manors, hamlets, or districts," about to be divided and inclosed; and, for preventing or adjusting those disputes, the commissioner, under the powers thereby conferred upon him, is to settle the boundaries. Previously, however, to his executing this duty, he is to give several very formal and public notices, to attract and ensure attention to the manner of his performance of it. Subsequently to the commissioner's settling the boundaries he is required by the act to give a notice to

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“ one of the churchwardens or overseers of the poor of the *respective parishes*,” omitting entirely any mention of the officers of districts; and out of this omission the question before us has arisen.

In the parish of *Berkeley* above mentioned, there are four districts called tithings, which districts, according to the statement in the case, have, so far back as memory goes, each nominated a separate churchwarden, who, after his appointment, uniformly acts within and for his own district, “except the signing the presentments annually made to the archdeacon of the state of repair of the church and other presentable matters, which are signed by all four churchwardens.” They are also sworn to execute the office of churchwarden “within their parish.” An inclosure having taken place within the adjoining parish of *Leonard Stanley*, the commissioners for settling boundaries had adjusted them between that parish and the adjoining part of the parish of *Berkeley* which lay in the tithing of *Alkington*, and, in so doing, had fixed certain lands, of which the defendant is occupier, to be in the parish of *Leonard Stanley*. And the single question is, whether the act of the commissioner was invalid; in which case the lands would remain in *Alkington*, and the defendant would be properly rated for them; otherwise not.

The sessions, properly as we think, refused to hear evidence as to the giving or omitting the preliminary notices, and reserved for us the question, whether a notice served upon one *Seaborne*, who had been appointed churchwarden for the tithing of *Berkeley*, was a service upon a churchwarden of the parish of *Berkeley*.

It is said that there is no such person as a churchwarden of the *parish of Berkeley*; and, if that be said truly,

truly, it follows that it was impossible for the commissioner to comply, literally, with the provisions of the statute: for it has been already noticed that no officer of a district is therein mentioned; and yet it cannot, we presume, be doubted but that the case was clearly within the contemplation and objects of the statute. It has been urged, in furtherance of the objection, that the commissioner should have served a notice upon an officer of each tithing, or, at least, upon that of *Alkington*. If he had adopted either course, we are by no means sure that he would not have been met by an objection, exactly the converse of this, that, by law, no such officer as a churchwarden of a portion of a parish can exist.

Placed, therefore, as the commissioner certainly was, in a difficulty, in a case too where he was, as certainly, meant to act, we think that we should see very clear and convincing reasons for considering his act invalid, before we arrive at that conclusion. And in the result we are not so satisfied. Generally speaking, the churchwarden is peculiarly, and emphatically, a *parish* officer. The nomination may be (not unusually is) by a portion of, or even by a person in, the parish; but the office is not thereby affected. He is still of, and for, the parish. We think that this may be considered as a somewhat unusual case, of separate appointment, and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. They are sworn in as *for the parish*; the acts, before particularly alluded to, are *for the parish*; the general and undoubted character of the office is *for the parish*. Upon the whole, we are of opinion that the ascertain-

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ment of boundary by the commissioner was, under these circumstances, well performed, and that the defendant was improperly rated in *Alkington*. The order of sessions must therefore be quashed.

Order of sessions quashed.

IN THE EXCHEQUER CHAMBER.

(Error from the King's Bench.)

The KING *against* THOMAS JOHNSON.

A custom of the city of *London*, for the court of Mayor and aldermen to examine and determine whether or not a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their discretion and sound consciences, a fit and proper person and duly qualified, is a valid custom.

QUO WARRANTO for the office of alderman of the city of *London*.

Pleas. 1. That the city of *London* is, and from time immemorial hath been, an ancient city, and that the citizens and freemen of the said city during all that time have been a body corporate, &c.; the plea then stated

So a custom, that, when the inhabitants of any ward shall three times return to the said court the same person to be alderman, who shall be by the said court, according to the former custom, adjudged on such three returns, according to the discretion and sound consciences of the Mayor and aldermen, not a fit person to support the dignity and discharge the duties of the office, the Mayor and aldermen may, for remedy thereof, nominate, elect, and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward.

The latter custom is not abrogated by stat. 11 G. 1. c. 18. s. 7.

Nor by the by-law of the city, 13 *Ann.*, "for reviving the ancient manner of electing aldermen," which, (after reciting that, by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants of that ward, having right to vote, were wont to choose one person only, being a citizen and freeman, to be alderman of the ward, enacts that, for reviving that custom, and restoring to the inhabitants their ancient right of choosing one person only to be their alderman, there shall from thenceforth, in all elections of aldermen of the city, at a wardmote to be holden for that purpose, be elected, according to the said ancient custom, only one able and sufficient citizen and freeman, to be returned to the court of Mayor and aldermen, which person so elected shall be by them admitted and sworn.

On quo warranto for exercising the office of alderman of *London*, the defendant pleaded the two first-mentioned customs, and that, *M. S.*, being three times returned by the ward, and adjudged unfit by the Mayor and aldermen, they elected the defendant. The relator took issue upon the existence of the customs, and replied that *M. S.* was a fit &c., upon which issue was joined. The jury having found the customs, the Judge, without consent of parties, discharged the jury from giving a verdict on the issue as to the fitness &c. of *S.*

Held, that he might properly do so.

(as

(as in *Rex v. The Mayor of London* (a)) the constitution of the city as to its wards and aldermen, and the Court of Mayor and Aldermen (b), and the custom of holding wardmote courts for election to offices. It then described, as in that case (page 4.), the Court of Common Council, and stated, as there, the authority of the mayor, aldermen, and commons, assembled in common council, to make by-laws: and that, from time immemorial,—until the making of a by-law or act of common council, 21 Ric. 2., touching the election of aldermen, whereby it was ordained that for the future, in the elections of aldermen, two at least, honest and discreet men, should be chosen and presented to the mayor and aldermen, so that either of them, whom they should choose, might be admitted and sworn; and also after the making of another by-law or act of common council of 13 Ann., “for reviving the ancient manner of electing aldermen,” whereby, “after reciting (amongst other things) that, by the ancient usage and custom of the city of *London*, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of that ward, having a right to vote in such elections, were wont to choose one person only, being a citizen and freeman of the same city, to be alderman of the same ward, for reviving the said ancient custom, and restoring to the said inhabitants their ancient rights and privileges of choosing one person only to be their alderman, it was enacted that, from thenceforth, in all elections of aldermen of the said city at a wardmote to be holden for that purpose, there

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(a) 9 B. & C. 1.

(b) Adding, as one of the functions of this court, the admitting and swearing in of persons duly elected aldermen.

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should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be returned to the court of mayor and aldermen, which person so elected should be by them admitted and sworn, well and truly to execute the said office of alderman;" and from thence hitherto, — the aldermen of the divers wards, and amongst others of the ward of *Portsoken*, have of right been elected and chosen at such wardmote courts as aforesaid, holden as aforesaid in the respective wards by virtue of precepts, &c., one alderman for each ward. The plea then stated,

"That the said Court of Mayor and Aldermen, holden as aforesaid, according to the custom of the said city from time immemorial, have had, and of right ought to have had, and still of right ought to have, the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the election and return of every person elected into a place or office within the said city at any such wardmote court holden as aforesaid, whensoever the merits of such election or return have been brought into question by the petition of any person interested therein, to the said Court of Mayor and Aldermen holden as aforesaid, and also of examining and determining whether or not any person so returned to the said Court of Mayor and Aldermen, as an alderman of any ward of the said city, is, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being, a fit and proper person and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned has been brought into question by the petition of any person interested therein to the said

said Court of Mayor and Aldermen holden as aforesaid, to wit at the city of *London* aforesaid, and that, according to the custom of the said city from time immemorial, it hath been and still is a necessary qualification of the person to be elected, admitted, and sworn into the place and office of an alderman of any ward of the said city, that such person should be a fit and proper person to support the dignity and discharge the duties of the said office of an alderman of the said city, and the honour and charges of the said city, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being, to wit at" &c. "That within the said city of *London* there now is, and from time immemorial there hath been, and still is, a certain ancient and laudable custom there used and approved of, viz. that, whenever it should happen that the inhabitants of any ward of the said city should three times return to the said Court of Mayor and Aldermen the same person to be alderman of any such ward, who should be by the said Court, according to the custom aforesaid, adjudged and determined, according to the discretion and sound consciences of the said mayor and aldermen, not a person fit and proper to support the dignity and discharge the duties of the said place or office of an alderman of the said city upon such three several returns, that then the said Court of Mayor and Aldermen lawfully might and may, for remedy in that behalf, nominate, elect, and admit, and they have been used and accustomed so to nominate, elect, and admit, a fit and proper person, being a freeman of the said city, out of the whole body of the citizens of the said city, to be alderman of any such ward, being so made destitute of an alderman, to wit at" &c.

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The plea then stated that a wardmote court was holden, *February* 8th, 1831, to elect an alderman for *Portoken* (that office being vacant by the resignation of Sir *James Shaw*), at which election *Michael Scales* was a candidate, and had a majority of votes, and was returned to the Court of Aldermen as elected; but, on petition, the Court of Mayor and Aldermen, after hearing the parties (on *March* 22d, 29th &c., 1831) touching the merits of the election and the qualification and fitness of *M. S.*, adjudged and determined (*May* 10th, 1831), according to their discretion and sound consciences, that *M. S.* was not a person fit and proper to support the dignity and discharge the duties of the said office; and he was then by the said then Court of Mayor and Aldermen rejected as insufficient for the said office. That, the vacancy by Sir *James Shaw's* resignation not having been filled up, another wardmote court was held. The plea then stated the proceedings on a second election, when *Scales* was again returned; and that, on petition to the Court of Mayor and Aldermen, he was again, *January* 3d, 1832, rejected as not being a person fit and proper &c. (a). The plea then stated a third election, *June* 26th, 1833, at which *Scales* and the defendant were candidates, and *Scales* was returned; and that, upon petition, the Court of Mayor and Aldermen, on *October* 29th, 1833, "did take the said last-mentioned petition into consideration, and, having heard the petitioners by themselves, their agents and witnesses, and also having heard the said *M. S.* touching the merits of the said last-mentioned election, and the qualification and fitness of the said *M. S.* to be such alderman as aforesaid, and the

(a) See *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255; *Rex v. Same*, 5 B. & Ad. 233.

said

said *M. S.* not producing any witnesses on his behalf, and the said last-mentioned Court having referred to the minutes of the proceedings of the said Court held on the 29th day of *March* &c., 1831, and also having referred to the minutes of the proceedings of the said Court, held on the 9d day of *January* 1832, and due deliberation being thereupon had, the said Court of Mayor and Aldermen did, on the said 29th day of *October* 1833, to wit at &c., adjudge and determine, according to their discretion and sound consciences, that the said *M. S.*, upon and from the said 26th day of *June* 1833, as well as upon and from the said 10th day of *May* 1831, and continually from thence to the said 29th day of *October* 1833, had been and then still was not a person fit and proper to support the dignity" &c., nor to be admitted and sworn into the office; and the said Court did further adjudge and determine that he was not duly elected to be alderman of *Portsoken* at the last-mentioned election; and the said *M. S.* was, on &c., again rejected by the said Court as insufficient &c. The plea then stated, "That, on its appearing to the said Court of Mayor and Aldermen holden" &c., *October* 29th, 1833, "that the said *Michael Scales* had been three several times returned by the inhabitants of the said ward of *Portsoken* to the said Court of Mayor and Aldermen as having been elected to be alderman of the said ward, and that the said several elections of the said *M. S.* to be such alderman had, upon each such return, been rejected by the said Court of Mayor and Aldermen, and that the said *M. S.* had, upon such return, been adjudged by the said Court of Mayor and Aldermen to be a person not fit and proper to support the dignity and discharge the duties of the said place and office

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office of an alderman of the said city, nor a fit and proper person to be admitted and sworn into the place and office of alderman of the said ward, the said Court of Mayor and Aldermen did, in pursuance of and according to the said ancient custom in that behalf, nominate and elect the said defendant, citizen and cooper of *London*, out of the whole body of the citizens of the said city, as a fit and proper person to be alderman of the said ward, and a fit and proper person to support the dignity and discharge the duties of the place and office of an alderman of the said city, to wit at" &c., "and thereupon the said defendant was by the said last-mentioned Court of Mayor and Aldermen in due manner elected, chosen, and nominated to be alderman of the said ward of *Portsoken*, according to the said ancient custom in that behalf, in the room and stead of Sir *James Shaw*, &c." The plea then stated the swearing in and admission of the defendant: by reason of which said several premises &c. Traverse of usurpation. Verification.

2d Plea. Similar to the first, except that, in stating the right to examine and determine upon elections, it omitted the qualification "whensoever the merits of such election or return have been brought into question by the petition of any person interested therein;" and it made the like omission in the clause asserting the right to determine on the qualification of any person returned, adding, after the words "qualified in that behalf," — "and thereupon to reject such person as in their discretion and sound consciences was not a fit and proper person, and duly qualified for the said place and office:" and, in stating the rejections, it did not mention any petition. And, in setting out the custom to elect after three rejections, it added, after the words
"alderman

“alderman of the said city,” — “and be thereupon rejected by the said Court of Mayor and Aldermen, as insufficient for the said place and office, for the reason and according to the custom aforesaid.” The 3d plea alleged that, on the election at which *Scales* and the defendant were candidates, the latter was duly elected. Each concluded with a verification.

Replication. 1. Denying that the Court of Mayor and Aldermen, by the custom of the city, from time whereof &c., have had and ought to have had, &c., the cognisance and jurisdiction of determining upon elections, and upon the qualification of persons elected, on petition, as alleged in the first plea. Conclusion to the country.

2. Traversing the custom for the mayor and aldermen to elect after three rejections of the same person, as alleged in the first plea. Conclusion to the country.

3. and 4. Similar replication, *mutatis mutandis*, to the second plea.

5. To the third plea, denying that defendant was duly elected, and concluding to the country.

6, 7, 8. To the first plea, alleging, respectively, that *Scales*, at the times of the first, second, and third elections, and of his rejections thereupon, was an able and sufficient citizen and freeman, and a fit and proper person to support the dignity and discharge the duties, &c. Verification. Issues thereon.

9, 10, 11. Similar replication, *mutatis mutandis*, to the second plea. Issues thereon.

The cause was tried before Lord *Denman* C. J. at the sittings in *London* after *Michaelmas* term, 1834. Evidence being tendered on behalf of Mr. *Scales* upon the issues as to his sufficiency, the Lord Chief Justice refused to admit such evidence, holding the issues to

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be immaterial; and he discharged the jury from giving any verdict upon them. On the other issues, the jury found a verdict generally for the defendant. A bill of exceptions was tendered, on the grounds stated thirdly and fourthly in the writ of error after mentioned. The *postea* was drawn up with a finding for the defendant upon the four issues as to the customs stated in the first two pleas, but against him upon the issue on the third plea: and, as to the remaining issues, the *postea* stated that the jurors were discharged from giving any verdict (a): and the judgment was, that the office, &c., claimed by the defendant be allowed and adjudged to him, and that he be discharged of the premises &c., and depart hence without day, &c., and recover for his costs, &c.

Error was brought upon the judgment, and the following grounds assigned: — 1. That judgment was given for the defendant on the issues as to the custom for the Mayor and aldermen to elect after three rejections as stated in the first two pleas; whereas it appears by the record that there now is not, nor hath been from time whereof &c., any such custom, but, on the contrary, it appears by the record that a certain by-law, &c., was duly made (reciting the by-law of 13 *Ann.*, p. 489, *antè*). 2. That by pleas 1 and 2 it is alleged

(a) This was stated on the record as follows: — “ And as to the issue,” &c., “ whether the said *Michael Scales* at the time of the election, in the said first plea of the said *Thomas Johnson* first mentioned, and also at the time when he was so rejected,” &c., “ as in the said first plea mentioned, was an able and sufficient citizen and freeman,” &c., “ in manner and form” &c., “ or not;” And as to the issue,” &c. (similar introduction referring to the other issues upon the first and second pleas, as to the several elections therein mentioned) “ the jurors of the said jury are by the Court here altogether discharged from giving any verdict of and upon the premises in the said several issues so ” &c. sixthly, seventhly, “ within joined, or any of them.”

that

that the Court of Mayor and Aldermen may elect a freeman to be alderman of any ward destitute of an alderman, which right hath been put in issue (referring to the particular issues), and judgment thereupon given for the defendant, whereas it appears by the record that the inhabitants of any ward, having a right to vote, are to elect a citizen and freeman to be alderman, which person so elected shall be admitted and sworn in by the Court of Mayor and Aldermen.

3. That the counsel for the Crown tendered witnesses on the issues as to *Scales's* sufficiency, but the defendant's counsel contended that they ought not to be received, and thereupon the Lord Chief Justice delivered his opinion to the jury that they ought not to be examined, and refused to permit them to be examined, and discharged the jury from giving a verdict on those issues. 4. That the counsel for the Crown referred to a statute (11 G. 1. c. 18.) for regulating elections within the city of *London*, &c., and insisted that, on the proper construction of that act, the jury should be directed to find for the relator on the issues as to the alleged customs, but the defendant's counsel insisted to the contrary, and the Lord Chief Justice directed the jury that, if they were of opinion that the custom set forth in the first and second pleas had existed from time immemorial down to 1689 (a), then, in his opinion, the said statute did not put an end to such custom, or prevent their finding, and that they should find, a verdict for the defendant upon the last mentioned issues; and they did so. 5. That the verdict, and 6. that the judgment, upon the last-mentioned issues was for the

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(a) Evidence had been given to shew the existence of the customs down to that time.

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defendant, whereas it ought to have been for the Crown. Joinder in error.

The writ of error was argued in the Exchequer Chamber, during this term (a).

Erle, for the Crown. It has not been thought necessary to bring before this Court the alleged custom for the Court of Mayor and Aldermen to determine upon the fitness of persons elected and returned to them by the wardmote, the points stated in the assignment of errors being deemed sufficiently clear and decisive. Then, as to the custom pleaded below, for the mayor and aldermen to elect after three rejections of the person elected and returned by the wardmote: that custom, if it ever existed, is abolished, in the first place by stat. 11 G. 1. c. 18. s. 7. (b). The intention of that enactment appears from the preamble to the statute, and the recital of the section itself. Disputes had arisen concerning the right of election of aldermen; and, to settle these for the future, the clause was introduced, enacting that the right of election of aldermen should belong to freemen of the city, being householders, paying scot and bearing

(a) *June 2d.* Before *Tindal C. J., Park, Gaslee, Bosanquet*, and *Vaughan Js., Parke, Bolland, Gurney*, and *Alderson Bs.*

(b) Stat. 11 G. 1. c. 18. s. 7. "And whereas divers controversies and disputes have arisen in the said city of *London* touching the right of election of aldermen and common councilmen for the respective wards of the said city; for quieting all such disputes and controversies for the future, it is hereby further enacted by the authority aforesaid, that from and after" *June 1st 1725*, "the right of election of aldermen and common councilmen for the several and respective wards of the said city shall belong and appertain to freemen of the said city of *London*, being householders, paying scot as hereinafter is mentioned and provided, and bearing lot, when required, in their several and respective wards, and to none other whatsoever." The qualification of the electors is further defined in the subsequent sections.

lot,

lot, and to none other whatsoever. The enactment is express, and, therefore, sufficient to abrogate the custom relied upon by the defendants, even if valid in itself. Sects. 15. and 16. shew that, where the Mayor and aldermen desired to retain rights under this act, care was taken to reserve and define them expressly. This is not a description of right in favour of which any thing will be presumed, the claim being one which tends to withdraw the right of choosing aldermen from the inhabitants of the wards, and place it in the hands of the Mayor and aldermen. In *Rex v. The Mayor and Aldermen of London (a)*, where the question was as to the validity of the alleged custom for the Mayor and aldermen to inquire into the fitness of any person returned to them as an alderman elect, it was urged at the bar that the custom did not contravene stat. 11 G. 1. c. 18. s. 7., because such custom related, not to elections, but to the examination and approval of persons already elected; and Lord *Tenterden's* judgment, on this point, proceeded wholly on the same distinction. But his Lordship said (after observing that the right of election had been settled by the legislature), "it is impossible to say that any mode of election, otherwise than according to the right so settled and ordained can be a good election." In a former case of *Rex v. The Mayor of London (b)*, Lord *Tenterden* said, "All ancient customs and prescriptions are to be considered with reference to the rules of the common law; if found to be repugnant to those rules, and contrary to law on any ground, they have always been held to be invalid. And an act of parliament confirming, in general terms, the ancient usages and customs of a city, must, as I apprehend, be

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(a) 3 B. & Ad. 255.

(b) 9 B. & C. 1.

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considered to confirm those only which have not such repugnance or contrariety." P. 29. And again, as to the operation of the statute now in question: "It is not necessary to consider the effect of the statute 11 G. 1. c. 18. upon the by-laws of the corporation, (though, without doubt, where they are inconsistent with each other, the regulations ordained by the statute must prevail)." P. 30. *Regina v. The Mayor and Aldermen of Norwich* (a) and *Wright v. Fawcett* (b) are among the cases which illustrate the distinction between electing and approving.

Secondly, the by-law of 13 Ann., set out in the first plea, enacts that from thenceforth, in all wardmote elections of aldermen, one person only shall be elected, to be returned to the Court of Mayor and Aldermen, which person so elected shall be by them admitted and sworn. That by-law, not being contradicted by any statute, was, in effect, an abolition of the custom now in question. The binding effect of a by-law of the city of *London*, where it does not contravene any statute, is recognised in *Rex. v. The Mayor and Aldermen of London* (c) already cited. The ordinances of the city of *London* have indeed a peculiar authority, as is stated in the judgment of *Bridgman C. J.* in *Hutchins v. Player* (d); and,

in

(a) 2 *Ld. Ray.* 1244. (b) 4 *Burr.* 2041. (c) 9 *B. & C.* 1.

(d) *Sir O. Bridgman's* Judgments, 272. The passage cited above is as follows: — Speaking of the custom that the mayor and aldermen, by consent of the commonalty, should ordain a remedy if any customs in the city should be found hard or defective, &c., the Lord Chief Justice says (p. 279.), "I think it is good; and therefore of necessary use to be set forth to shew, that by their custom, which is confirmed by parliament, they have power to make ordinances, or acts of common council; and that ordinances, so made according to that custom, so confirmed by act of parliament, and according to the qualification prescribed, do bind; and that therefore these ordinances are not to be compared to a power

by

in particular, with respect to the alteration of customs that need amendment. The by-law of 13 *Ann.* evidently has reference to the same disputes as the statute 11 *G. 1. c. 18.*, and was passed with the same intent as sect. 7. of that act.

Thirdly, the evidence of fitness for the office ought not to have been rejected. The mayor and aldermen claim a right to sit in judgment and accept or reject the nominee of the parties empowered to elect; and it is said that, in so doing, they may act (in the words of the alleged custom) according to their "discretion and sound consciences." But they are claiming to adjudge upon a right in dispute between other parties; and they must, therefore, exercise their discretion upon assignable grounds. The issue here, upon the fitness or unfitness of the party rejected by them, was proper and material. Even if the defendants had an irresponsible discretionary power, yet, as they have raised the question of fitness by their pleadings, and joined issue upon it, their exercise of discretion has become a proper subject of inquiry. The case is so far like *Rex v. The Bailiffs, &c. of Ipswich (a)*, where the defendants

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by charter, or custom in general, to make by-laws. This was the opinion, not only of the counsel in *Wagoner's case*," (8 *Rep.* 121 b.) "but in infinite precedents before that case, and since, where, upon returns to writs of *habeas corpus*, in the front this custom of supplying defects in former customs, or putting new remedies, if the case requires, is set forth. And it is the foundation of most of the ordinances now in force in London for the government of the city; which would be shaken if you take away this pillar, and leave to London no more power touching by-laws than you do to every ordinary corporation or company." As to the confirmations of the above custom, see Appendix to the Report of the Municipal Commissioners for *England and Wales* (*London and Southwark*, sect. 10. p. 6., sect. 12. p. 12., sect. 14. p. 16.).

(a) 2 *Ld. Ray.* 1240.

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claimed an absolute power of removing their recorder, his office being *ad libitum*; but as they had, on mandamus, returned a cause for removing him (which the Court deemed insufficient), it was held that they could not afterwards avail themselves of their *ad libitum* power in opposition to a rule for a peremptory mandamus. But the present case is not within the authority of those in which the exercise of discretion has been held exempt from inquiry. Thus in *Rex v. The Borough of Andover* (a) the question arose, not upon a claim of the defendants to interfere with the right of others to elect or retain, but upon their exercise of an authority vested in themselves to remove “*quando-cunque illis placuerit*.” The express words of the charter gave them an arbitrary authority. *Rex v. The Mayor, &c. of Stratford-upon-Avon* (b) and *Rex v. The Churchwardens of Thame* (c) were similar cases. So, in *Rex v. The Bishop of Gloucester* (d), where the Court held that the Bishop could not be called upon to assign his reasons for approving or disapproving of a deputy appointed by his registrars, the registrars derived their power of appointment from the Bishop, subject to the condition that their appointment was such as he approved of. But the authority here exercised is analogous to that of a bishop in determining on the sufficiency of a clerk presented to a living. The bishop there sits as judge, and, if he rejects, is bound to assign the cause of his refusal; 1 *Bla. Com.* 389.; *Specot's Case* (e): the principle is also admitted in *Rex v. The Bishop of London* (g), and in *Rex v. The Bishop of*

(a) 1 *Ld. Ray.* 710.(b) 1 *Lev.* 291.(c) 1 *Str.* 115.(d) 2 *B. & Ad.* 158.(e) 5 *Rep.* 57 b. 58 a.(g) 1 *Wils.* 11.

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London, (on the application of Dr. *Povah*) (a), where the Court declined acting upon it, only because there was another jurisdiction concurrent with that of the bishop, which had not been resorted to.

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Sir *J. Campbell*, Attorney-General, *contra*. It may be assumed, from the course of argument on the other side, that the custom for the Mayor and aldermen to judge of the fitness of persons returned by the wardmote cannot be effectually disputed. If, then, the Mayor and aldermen have a veto upon the elections, there ought to be some means of terminating the contests which may arise if the wardmote continues to return the same person; otherwise the office of alderman might be kept perpetually vacant. It is therefore probable, at least, that the custom now in question should have existed; whatever affects this tends to abrogate the other. The statute 11 G. 1. c. 18. s. 7. merely regulates the proceedings of the wardmote; it does not touch upon the powers of the Mayor and aldermen; nor do those powers appear, either from the general preamble of the act, or from the recital of sect. 7, to have been among the matters in dispute when the act passed. Sects. 15 and 16 have no reference to the Court of Mayor and Aldermen. They continue to choose the lord mayor out of the two persons returned by the livery; yet that is not among the powers saved by sect. 16. If the election of an alderman by them, after three rejections, was one of the customs of the city confirmed by statute, it would require very strong words in any subsequent enactment to abolish that custom: but sect. 7 of stat. 11 G. 1.

(a) 13 *East*, 419.

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c. 18. is not inconsistent with it. Then as to the by-law of 13 *Ann.* The custom, assuming it to exist, must be taken to originate in a charter or statute. A by-law may be made in furtherance of a custom so established, but not to cut down, and essentially change it; *Rex v. Cutbush (a)*, *Newling v. Francis (b)*. Besides, the by-law of 13 *Ann.* only restores the ancient privilege of the wards to elect one alderman, instead of returning two, of whom the mayor and aldermen were to choose one. The ward is now to elect and return one person to be alderman, which person, so elected, is to be admitted and sworn in; but this provision does not, expressly or impliedly, take away the right of the mayor and aldermen to judge whether the person is duly elected, and to reject him if he is unfit; nor, therefore, does it interfere with their privilege of electing after three rejections of the same person. [*Parke B.* Mr. *Erle* contends that the corporation of *London* have a peculiar power of altering their ancient customs.] They cannot alter them so as to destroy the powers residing in integral parts of the corporation. Then, as to the rejection of evidence; if the issues upon which the evidence was tendered became immaterial, it was right to reject the evidence and discharge the jury from giving any verdict; *Cossey v. Diggons (c)*. [*Parke B.* referred to *Powell v. Sonnett (d)*.] That these issues were immaterial appears from *Rex v. The Mayor and Aldermen of London (e)*, where it was held a valid custom that the Mayor and aldermen should decide according to their discretion on the fitness of a party returned to them as alderman; and,

(a) 4 *Burr.* 2204.(b) 3 *T. R.* 189.(c) 2 *B. & Ald.* 546.(d) 3 *Bing.* 381. *S. C.* in *D. P.* 1 *Bligh, N. S.* 545.(e) 3 *B. & Ad.* 255.

on mandamus to admit, this Court considered it a sufficient return that, in the exercise of such discretion, they had adjudged the elected party to be insufficient, although they assigned no reasons. There may be many cases where the party may be properly deemed unfit, and yet the reasons may not be capable of direct proof. Indeed the question for their decision, according to the custom, is, not whether the party be fit, but whether he be so "according to the discretion and sound consciences" of the mayor and aldermen; their opinion being thus made an essential ingredient in the determination. The pleas here do not allege that the party was simply unfit. The circumstance of the defendant having joined issue upon the question of absolute fitness cannot make that material which in itself is not so. [Parke B. In *Bowman v. Rostron* (a), where the defendant had pleaded matter which he was clearly estopped from setting up, but the plaintiff had taken issue on the pleas, it was held that the defendant was entitled to offer evidence upon them. Has not a party, in such a case, a right to have a finding of the jury put upon the record, so that he may obtain a decision of the House of Lords upon it; whereas, if the jury are discharged, he can only have a venire de novo?] That may be inconvenient; but it would be a much greater inconvenience that all issues, however, absurd, should be gone into and submitted to the jury. It must be assumed that the judge is able to decide whether a particular issue is material or not.

Erle, in reply. Stat. 11 G. 1. c. 18. s. 7. does not relate merely to the proceedings in wardmote. The

(a) 2 A. & E. 295. note (b). S. C. (as *Bowman v. Rostron*), *Harr.* 4 W. 221.

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recital of the statute, sect. 1, is general, that "of late years great controversies and dissensions have arisen in the city of *London* at the elections of citizens to serve in parliament, and of mayors, aldermen, sheriffs, and other officers of the said city." The enactment of sect. 7 must be referred to that. And sect. 15 shews that the act does not contemplate the proceedings in wardmote merely. The custom here alleged might be carried to the extent of enabling the Mayor and aldermen to nominate for all the wards in the city. And the arguments on the other side would apply equally to a claim of electing after only two rejections. [*Tindal* C. J. The reasonableness of a custom must always be one of the grounds on which it is to be supported]. Supposing a custom established, for the mayor and aldermen to decide upon the fitness of parties returned, it does not necessarily follow that a custom for them to elect after three rejections should be valid. That power is at least not so necessary, nor so apparently advantageous. The custom in question, if existing, might be altered by the by-law of 13 *Ann.* *Hutchins v. Player* (a) shews that the customs of the city of *London* may be so altered, and that the making of such alteration by a by-law is one of the customs which are the subject of the parliamentary confirmation of 7 *Ric.* 2., set out in *The City of Colchester v. The City of London* (b). The by-law of 13 *Ann.* is, in terms, sufficient to alter the custom now alleged; and that by-law was not rightly presented to the consideration of the jury. As to the issues which the defendant has taken on the question of fitness or unfitness, and which are now alleged to have been immaterial, the

(a) *Sir O. Bridgman's Judgments*, (see p. 500. *antè*).

(b) 1 (*W.*) *Jones*, 240.

observation of *Taunton J.* in *Rex v. The Mayor and Aldermen of London* (a) may be adopted: "that where a corporate office is held *durante bene placito*, it is a sufficient return to a *mandamus* that the corporation have determined their pleasure; but if the corporation are so candid as to state their reasons, and allege bad ones, this Court will in such cases interfere." In *Bowman v. Rostron* (b) *Patteson J.* asked, "Are you aware of any case in which it has been held that a Judge at *Nisi Prius* has a right to reject evidence in support of a plea upon which a specific issue has been raised?" and no case was cited. [*Tindal C. J.* There have been instances in which it has been done. *Parke B.* The judgment of *Best C. J.* in *Powell v. Sonnett* (c) seems to imply that there may there have been a consent to withdraw the immaterial issues].

Cur. adv. vult.

TINDAL C. J. in this term, June 8th, delivered the judgment of the Court.

This case comes before us on a bill of exceptions tendered to Lord *Denman* on the trial of this cause by the counsel of the party on whose relation the information proceeded.

The exceptions taken to the direction of the Lord Chief Justice to the jury were two: first, that he refused to allow witnesses to be examined in support of the issues raised upon the pleadings with respect to *Michael Scales* being an able and sufficient citizen and freeman of the city of *London*, and a fit and proper person to support the dignity and discharge the duties

(a) 3 B. & Ad. 274.

(b) *Harr. & W.* 222.

(c) 3 Bing. 381. See *Tinkler v. Rowland*, 4 A. & E. 868.

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of an alderman of that city, and that he wholly discharged the jurors from giving any verdict upon those issues. And, secondly, that the said Chief Justice directed the jury, that, if they thought the customs set forth in the first and second pleas had existed from time immemorial down to the year 1689, the 11 G. 1. c. 18. did not put an end to such customs, and in that case they should find a verdict for the defendant on the four issues first in order on the record.

It will be more desirable in the first place to state our opinion as to the second exception, as the judgment formed by us on that exception will form the groundwork of the opinion at which we have arrived upon the subject of the first.

The custom which forms the subject of the first and third issues is a custom that the Court of Mayor and Aldermen from time immemorial have had the cognisance and determination of the election and return of every person elected into any place or office at any wardmote court, whenever the merits of such election were brought into question, and of examining and determining whether any person, returned to them as an alderman of any ward of the city, is, according to the discretion and sound consciences of the Mayor and aldermen, a fit and proper person and duly qualified in that behalf. The custom which forms the subject of the second and fourth issues is a custom that, whenever it should happen that the inhabitants of any ward should three times return to the Court of Mayor and Aldermen the same person to be an alderman of any such ward, who should, according to the former custom, be adjudged and determined, according to the discretion and sound consciences of the Mayor and aldermen, not a person

fit

fit and proper to support the dignity and discharge the duties of the place and office of an alderman of the said city upon such three several returns, that the Court may, for remedy in that behalf, nominate, elect, and admit a fit and proper person, being a freeman of the said city, out of the body of the whole citizens, to be an alderman of such ward so made destitute of an alderman.

The first custom set up is, therefore, a custom to approve or reject: the second is a custom to nominate and elect, in case the same person is three times returned by the wardmote, and three times rejected as unfit by the Court of Mayor and Aldermen.

Now the only exception taken to the direction of the Lord Chief Justice, which goes to the validity of the customs above set forth, is, that the jury should have been directed by him that the statute 11 G. 1. c. 18. is in direct contravention of these customs, and in effect has abrogated them altogether.

To the validity of the first custom but little objection was made in the course of the argument. Indeed, after the determination of the case of *The Mayor and Aldermen of London* (a), where the legality of the custom of approval or rejection was brought distinctly before the Court of King's Bench, it is impossible to contend that it was not a legal custom still existing in full force, notwithstanding the statute of G. 1. The question, therefore, principally turns upon the effect of the statute as to the custom secondly set forth. Now we think that custom, considered in itself, a legal and reasonable custom, supplying a remedy

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THE KING
against
JOHNSON.

(a) 3 B. & Ad. 255.

where

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where an evil is likely to occur from the exercise of the custom to approve or reject, and without which remedy the first would become neither useful nor reasonable, from the consequences that might be expected necessarily to follow in many instances from its exercise. The question, therefore, becomes this, whether this custom in the second plea is repealed by the statute 11 G. 1. And we are all of opinion that it is not in any way affected thereby.

That statute was passed, principally, for the purpose of regulating the course of elections which take place at the wardmotes of the city; both of citizens to serve in parliament, of mayors, and other officers, and, as the first section expresses, "of aldermen and common councilmen chosen at the respective wardmotes of the said city;" and the first six sections of the statute are exclusively occupied with regulations as to the mode of taking the poll. The seventh section, after reciting that divers controversies and disputes had arisen in the city of *London* touching the right of election of aldermen and common councilmen for the respective wards of the city, enacts that, after the day therein specified, the right of election of aldermen and common councilmen for the several and respective wards of the city shall belong and appertain to freemen of the said city, being householders, and paying scot and bearing lot when required, and to none other whatsoever. The seven following sections contain provisions as to particular cases of qualifications for voting at such elections; and the sections which follow are foreign altogether to the subject-matter of the present inquiry. So that the statute, taken altogether, is no more than an enactment that the right of electing aldermen, amongst
other

other officers, shall be by the freemen of the city, being householders, at the wardmotes of the respective wards, the poll to be taken, and the right of voting to be determined, in the manner and under the regulations described in the act.

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Now the ancient customs which are the subject of the present discussion have themselves been confirmed, amongst the other ancient bye-laws and customs of the city, by parliament. And the first observation that arises thereupon is that, as these customs were in full operation at the time of the statute, and as the statute is altogether silent about the powers of the Court of Lord Mayor and Aldermen, there is nothing that can be construed into a repeal of either of the customs. In the next place, it is to be observed that the exercise of this custom is in no way inconsistent with the statute; for the custom does not begin to operate until after the statute, and all the provisions contained in it, have had their full operation and effect. The alderman must be first elected at the wardmote, by the electors, qualified according to the provisions of the statute, at a poll taken in the manner therein prescribed, before he can be returned to the Court of Lord Mayor and Aldermen for approval or rejection. Then it is, for the first time, that the two ancient customs begin to have their force. They contain a mode of trial of the fitness of the return, made under the statute, after the election has taken place; and apply to a point of time which is altogether out of the provisions, and even contemplation, of the statute.

In fact, the operation of the two customs, which are to be held of the same binding force as acts of parliament, is this; that, by the first, the election which has taken place at the wardmote is annulled; and, by the

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second, after three rejections, no further election at a wardmote can take place. Now these provisions are not at all inconsistent with a statute which only professes to regulate elections in the case of their taking place at a wardmote of the city.

The statute, therefore, and the two ancient customs may both stand well together; and we see no reason whatever for holding that the customs are not in full force, notwithstanding the provisions of the act.

It was further insisted, in the course of the argument on the part of the relator, that the bye-law of the 13th *Ann.* had the same effect, as to the annulling the customs set forth, as the statute has. It appears to us, however, to be unnecessary to give any other answer to this objection than that which has already been given as to the statute of G. 1. Both objections stand precisely upon the same ground: the only difference between the two being this; that, whilst the statute is, by necessary implication, only to be construed as speaking of the election at wardmotes of the city, the bye-law is confined in express terms to that mode of election.

The other exception tendered to the Lord Chief Justice at the trial related to his refusal to receive evidence tendered to him upon the several issues before referred to, and discharging the jury from giving any verdict on the same.

It appears to us that, the four issues which are first in order upon the record having been found in favour of the defendant, and the defendant being intitled in our opinion, notwithstanding the objections which have been taken, to judgment on those issues, it has become perfectly immaterial in favour of which of the two parties the jury might have found their verdict on the is-

sues

sues in question. For the fitness or unfitness of the party to fill the office of alderman having been already determined by a court, not only of competent, but exclusive jurisdiction, any finding of a jury on that point is altogether inoperative and useless. If this record had contained a verdict in favour of the relator upon these issues, we should have allowed the defendant, notwithstanding such verdict, to enter up judgment for himself; and it is therefore unnecessary to say that we cannot agree to send those issues to be tried, at a very useless expense, before a second jury. Indeed, the case of *Powell v. Sonnett*, in error in the House of Lords (a), furnishes a decisive authority that, when the jury have found their verdict on all the material issues joined, the remaining issues being perfectly immaterial as between the parties, the jury may be discharged, by the judge who tries the cause, from returning any verdict on such immaterial issues, without the consent of the parties.

We therefore think the judgment of the Court of King's Bench must be affirmed.

Judgment affirmed.

(a) 1 *Bligh*, N. S. p. 552.

1836.

—
The King
against
JOHNSON.

END OF TRINITY TERM.

C A S E S

1836.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

AND

ON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Seventh Year of the Reign of WILLIAM IV.

The Judges who usually sat in Banc in this term were,
Lord DENMAN C. J. WILLIAMS J.
PATTESON J. COLERIDGE J.

*Wednesday,
November 2d.*

DOE on the Demise of PERRY *against* GEORGE
NEWTON, and Mary his Wife.

On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause ; but not else.

ON the trial of this ejectment, before *Coleridge J.*, at the last Summer Assizes for *Cumberland*, the defendants produced the alleged will of one *John Brockbank*, on which they rested their title. The genuineness of the signature, purporting to be that of the testator, was disputed, and contradictory evidence given respecting it,

for

for the plaintiff and defendants. The plaintiff's counsel, in cross-examining one of the defendants' witnesses, put into his hand some letters, which the witness said he believed, from the character, to be of *Brockbank's* writing. It was afterwards proposed, on behalf of the plaintiff, to submit these letters to the jury, in order that they might compare them with the disputed signature, and thereby judge both of its genuineness and of the credit due to the witnesses on this subject. The letters were not in evidence for any other purpose. The learned Judge would not allow them to be put in; and the defendants had a verdict.

1836.

Don dem.
Penny
against
Newton.

Alexander now moved for a new trial, on the ground (among others) of the rejection of evidence. It has lately been decided, in *Griffith v. Williams (a)*, that the jury may compare documents for the purpose of ascertaining whether one is or is not genuine. It is true that the letters there compared appear to have been part of the evidence in the cause for other purposes; but that makes no difference. [Lord Denman C. J. A party wishing to disprove his own handwriting may easily produce writings made unlike on purpose.] In *Allesbrook v. Roach (b)*, which was an action on a bill of exchange, against the acceptor, the defendant's counsel, to shew that the acceptance was not genuine, offered to the jury other bills, admitted to be of the defendant's handwriting, and desired that they would compare them with the acceptance and draw their own conclusion. This was objected to; but Lord *Kenyon* said, "Some judges have doubted of the policy of that rule of evidence

(a) 1 Cro. & J. 47.

(b) 1 Esp. 351.

1836.

DOX dem.
PERRY
against
NEWTON.

respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis, the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have been always inclined to admit it; and shall do so in this case." Lord *Kenyon's* attention had been drawn to the same subject but a short time before, in *Stranger v. Searle (a)*. In *Solita v. Yarrow (b)* the jury were permitted to compare a genuine writing of the defendant with a disputed one ascribed to him; but there both documents were in evidence for other purposes of the cause. The distinction on this ground, however, appears to have been first suggested by *Bolland B.* in *Rex v. Morgan (c)*, and is not warranted by *Griffith v. Williams (d)*, to which the learned Judge referred in that case. Nor does there appear to be any difference in principle between writings put in for the sole purpose of contradiction, and writings in evidence for other purposes, if the genuineness of the document be clearly established in each case. The objection, that a jury may perhaps be illiterate, cannot have much weight at this day; and it is answered in 2 *Stark. on Ev.* p. 375. (2d edit.). The argument, that writings produced for the purpose of contradiction may be unfairly selected, would apply equally to ancient documents; but, in ascertaining the genuineness of those, a comparison with other writings from the same hand is constantly resorted to.

Lord DENMAN C. J. This is a point on which we ought not to raise any doubt. I rather think the deci-

(a) 1 *Esp.* 14.(b) 1 *M. & Rob.* 133.(c) 1 *M. & Rob.* 134. note.(d) 1 *Cro. & J.* 47.

sion in *Griffith v. Williams* (a) has been considered to go a long way; but the real ground upon which that rests appears to me to be that the comparison is unavoidable. There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the Court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped. I cannot easily reconcile Lord *Kenyon's* ruling in *Allesbrook v. Roach* (b) with what has been done in any other case. The facts indeed were peculiar; but I think that at present no judge would come to the same decision. The best rule is, that comparison of writings by the jury shall not be allowed in any case where it can be avoided. When we consider that the same course which is permitted in a case like this may also be resorted to in a criminal case for the purpose of a conviction, we cannot draw the limit too carefully.

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PATTERSON J. I always thought that the rule laid down in *Griffith v. Williams* (a) was limited to documents which were already before the jury. It is not said in the report of that case that necessity was the ground upon which the comparison was allowed; but I think that must have been so. It was impossible, in such a case, to prevent the jury from making a comparison. I have rejected evidence upon the ground of distinction now taken, in a case which came before me

(a) 1 Cro. & J. 47.

(b) 1 Esp. 351.

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against
NEWTON.

at *Gloucester*, I think on the Crown side; my opinion on the point, therefore, is not now formed for the first time. I did not know of the case of *Allesbrook v. Roach* (a); but, whatever respect I may feel for the authority of Lord *Kenyon*, I think that in ruling as he did there he went beyond the law, and introduced a practice which would be dangerous if followed up.

WILLIAMS J. I doubt if the facts of *Allesbrook v. Roach* (a) are correctly given; for the rule, if laid down there as it is stated, does not appear to have been acted upon since, although it might be supposed that such a decision by Lord *Kenyon*, whose judgment on points of evidence is so much respected, would have been followed up in other cases. I question the authority of the case, as there has been no corresponding practice. If the comparison here contended for were admitted, the party disputing a document ascribed to him might produce to the jury for that purpose a selection from any number of papers written by himself, which would be very dangerous. The decision in *Griffith v. Williams* (b) no doubt proceeded upon the ground that comparison of the documents, when they are in evidence for other purposes, cannot be avoided, and therefore it is better that the comparison should be made under the direction of the Court than in a corner.

COLERIDGE J. I am of the same opinion. It is true that the objection now taken applies in some degree to the proof of ancient writings by comparison, which is constantly allowed. But that is an excepted case, from necessity, the documents not being capable of proof in

(a) 1 *Esp.* 351.(b) 1 *Cro. & J.* 47.

the usual way; and the danger of improper selection is less than in the case of modern writings. In addition to the reasons which have been given in this case, it must be considered how many irrelevant issues a jury would have to try if the proposed comparison were allowed. Documents bearing upon the cause must be proved with reference to the main points in issue, independently of the question of handwriting; but, for the purpose of such a comparison, many documents quite irrelevant to the cause must be admitted, with the disadvantage that the opposite party could not be prepared for such evidence. It might even become necessary that the contents of such documents should be gone into.

1836.

DOX dem.
PRAY
against
NEWTON.

Rule refused (a).

(a) See *Bromage v. Rice*, 7 C. & P. 548. *Waddington v. Cousins*, 7 C. & P. 595. And *Doe dem. Mudd v. Suckermore*, which was argued in this term, November 17th, and in which judgment was given in *Trinity* term, June 8th, 1837.

REGULA GENERALIS.

Michaelmas Term 7 W. 4. (3d November 1836.)

IT IS ORDERED that, from and after the last day of this term, all rules upon sheriffs other than the sheriffs of *London* and *Middlesex*, to return writs either of mense or final process, and rules to bring in the bodies of defendants, be eight day rules instead of six day rules.

(Signed by the fifteen Judges).

1836.

Thursday,
November 3d.

DOE on the several Demises of ROWLANDSON, Assignee of MARGARET WILLIAMS, an Insolvent Debtor, of MARGARET WILLIAMS, and of JEREMIAH WILLIAMS, against WAINWRIGHT and LEDGERWOOD.

1. In an ejectment tried at *Liverpool*, notice to produce a deed of feoffment was given to the defendant on the commission day of the assizes, and the trial took place fourteen days after. The Judge at Nisi Prius having held this to be sufficient notice to let in secondary evidence, the Court refused to disturb the ruling.

2. Held, that an abstract, which had been compared with

the deed of feoffment, was good secondary evidence of the contents, no proof being given on either side of the existence of any copy of the deed. *Quære*, whether, if the existence of such a copy had been proved, the abstract would have been evidence?

3. It appeared, by the abstract, that the deed of feoffment purported to be executed by the parties; and it was proved that one *H.* had, after the date of the feoffment, been in possession of the premises, and of the deed; that he had conveyed (in what way it did not appear) to defendant, and, at the time of the conveyance, had handed over the feoffment to the defendant, and that the feoffment was comprehended in the abstract of title then made, which was the abstract produced at the trial. The witness, who proved as above, stated also that there were attesting witnesses to the feoffment, and that a memorandum of livery of seisin was indorsed upon it, and witnessed. Held that, as against the defendant, there was proof of the due execution of the deed, and that it was unnecessary to call an attesting witness, or prove livery of seisin.

4. In ejectment on the several demises of *A.* and *B.*, proof having been offered in support of both *A.*'s and *B.*'s title, defendant tendered evidence after the close of plaintiff's case, which was admissible only as against *B.*'s title: Held, that the plaintiff might, at that stage, abandon the demise of *B.*, and that, on his doing so, the evidence was inadmissible as against *A.*'s title.

EJECTMENT for messuages in *Liverpool*. On the trial before *Coleridge J.*, at the last *Liverpool* assizes, no evidence was offered in support of *Rowlandson's* demise. The demises were laid on 10th of *June* 1836. *Wainwright* defended as landlord, *Ledgerwood* as his tenant. It was proved, on the part of the plaintiff, that a person named *Oldham* was formerly owner of the premises; and the last two lessors of the plaintiff claimed under an indenture of feoffment, said to be dated the 9th of *July* 1807, between one *Rogers* of the first part, *Oldham* of the second, *Michael Williams* of the third, and *Jeremiah Williams*, the lessor of the plaintiff, of the fourth; by which *Rogers* and *Oldham* granted, bargained, sold, enfeoffed, and confirmed a parcel of

ground comprehending the premises in question to

Michael

Michael and *Jeremiah* in fee, habendum to them in fee, to the use of *Michael* and *Jeremiah* and the heirs of *Michael*, in trust, as to *Jeremiah's* estate, for *Michael* in fee. To prove the execution of this indenture, a witness named *Ridgway* was called, who stated that he had been in the employment of a person named *Houghton*; that *Houghton* had occupied the premises after 1807, and had sold them to the defendant *Wainwright* (a); that, at the time of the conveyance in 1807, an abstract of the title, of which the feoffment formed part, was made, and had been compared by the witness with the feoffment; and that, when *Wainwright* took possession, the feoffment, with other title deeds, was handed over to him. The witness produced an abstract, which he stated that he had, at the time of the sale, compared with the deeds. It was then proved that notice to produce the feoffment had been given to the defendants, on the commission day of the assizes, *August* 10th; the trial taking place on the 24th. All the parties resided in *Liverpool*. It was objected that this notice had not been early enough to entitle the plaintiff to give secondary evidence; but the learned Judge over-ruled the objection. The plaintiff's counsel then proposed to read the abstract; when the counsel for the defendant contended that proof ought to be given that there was no copy of the deed; but this objection also was over-ruled. The witness having stated that there were attesting witnesses to the deed, the counsel for the defendants contended that the abstract could not be read till one of the witnesses was called, or their absence accounted for: but the learned Judge was of opinion that *Wainwright* was shewn to claim under the deed, and that therefore the execution

1886.

Doz dem.
ROWLANDSON
against
WAINWRIGHT.

(a) This appeared to have taken place about 1827 or 1828.

1836.

Dea dem.
 ROWLANDSON
 against
 WASHINGTON

need not be proved. The abstract was then read; and the deed appeared from it to be as above stated. The witness stated that a memorandum of livery of seisin was indorsed on the indenture of feoffment, and witnessed. The defendants' counsel then contended that livery of seisin must be proved; but the learned Judge held that the same answer applied to this as to the preceding objection. His Lordship, however, reserved leave to move for a nonsuit, on all the objections. It appeared further that *Michael Williams* was in possession at the time of his death, *October 17th, 1821*, that he devised the premises to his widow, *Margaret Williams*, the lessor of the plaintiff, for life, and that she had occupied for some years after *Michael's* death, and before *Houghton* was in possession.

The defendants put in and proved an indenture of mortgage, dated the 15th of *October 1808*, by *Michael Williams* of the first part, *Jeremiah Williams* of the second, and two persons named *Holden* and *Gordon* of the third, by which *Michael* and *Jeremiah Williams* conveyed to *Holden* and *Gordon*, in fee, certain premises, which, as the defendants alleged, comprehended those in question; but this was disputed on the part of the plaintiff. The defendants also tendered in evidence indentures, dated the 26th and 27th of *October 1824*, by which *Margaret Williams* mortgaged to one *Etches* in fee certain premises, comprehending, as was contended, the premises in dispute. It was objected, for the plaintiff, that, as *Margaret Williams* appeared to have only an equitable estate at the time of the last conveyance, that conveyance was not evidence to shew an outstanding legal estate. The learned Judge ruled that, as *Margaret Williams* was one of the lessors of the plaintiff, the deed was evidence, unless the plaintiff's counsel abandoned that

that demise. He elected to do so; and the deed was rejected. His Lordship, in summing up, left it to the jury whether, upon all the facts, they were of opinion that the premises were comprehended in the deed of 1808. Verdict for the plaintiff, on the demise of *Jeremiah Williams*.

18361

Deed demised
Rowlandson
against
Wainwright

Neville now moved for a nonsuit, according to the leave reserved, or for a new trial, on the ground of mis-direction and rejection of evidence; and also upon other grounds which it is not thought necessary to state. First. The notice to produce was insufficient. It ought to have been given before the commencement of the assizes. In a large commercial town, like *Liverpool*, it is common for deeds to be deposited with bankers; and full time should be allowed for taking the measures necessary to withdraw the documents from such custody. Secondly. It should have been proved that there was no copy, before the abstract was read. [Lord *Denman* C. J. Have you any authority for that? If secondary evidence be made admissible, is not *all* secondary evidence let in.] The rule is that the best evidence must be given that the circumstances of the case will allow. [*Coleridge* J. The best in kind, but not necessarily the best in degree. *Williams* J. Suppose the secondary evidence had consisted merely of what the witness recollected, what objection could there have been?] No decision in the common law courts has been found precisely in point. In *Munn v. Godbold* (a) the Court adopted the dictum of Lord *Hardwicke* in *Villiers v. Villiers* (b), "If an original deed is lost, the counterpart may be read;

(a) 3 Bing. 295.

(b) 2 Atk. 72.

and

1836.

DOE dem.
ROWLANDSON
against
WAINWRIGHT.

and if there is no counterpart forthcoming, then a copy may be admitted;" Lord *Hardwicke* adds, "and even if there should be no copy, there may be parol evidence of the deed." If the existence of a counterpart exclude the copy, the existence of a copy must exclude parol evidence. [Lord *Denman* C. J. But you did not prove the existence of any copy.] That should have been negatived on the other side, to let in the inferior evidence. Thirdly. One of the witnesses, at least, to the deed of feoffment, ought to have been called, according to the peremptory rule laid down in 1 *Stark. Ev.* 320, (2d ed.); *Gillies v. Smither* (a). It was said, however, that the defendants claimed under the deed, and therefore could not dispute it; and *Doe dem. Tyndale v. Heming* (b) was cited. But, in that case, the attorney of the party had recognised the validity of the instrument: here nothing appeared, but that *Houghton* had sold the premises to the defendant *Wainwright*, and, at the time of the sale, had handed over this deed among others. The bare receipt of a deed is not a recognition of its validity. [*Coleridge* J. It formed part of the abstract of title.] The defendants were not privy to the abstract produced. Besides, it was not shewn that any legal estate was at that time conveyed to *Wainwright*. The evidence of *Ridgway* proved at the utmost no more than a parol contract. Fourthly. There should have been evidence of livery of seisin. Writing is essential to a feoffment only by the Statute of Frauds, 29 *Car. 2. c. 3. s. 1.*: livery is still the essential part, the formalities for which are prescribed, both in the case where there is a deed, and in that where there is not, in *Co. Lit.* 49. b. In *Gilbert on Ev.*

(a) 2 *Stark. N. P. C.* 528.(b) 6 *B. & C.* 28.

75, (6th ed.), a question is made whether, if a feoffment by deed be pleaded, a parol feoffment can be given in evidence; which shews that feoffments by parol, and consequently livery of seisin, accompanied feoffments by charter. It is true that, where there has been possession coupled with the deed of feoffment, livery may be presumed; but here no such possession was shewn: and, at the utmost, the presumption could only be a question for a jury. The law on this point is laid down in *Bulter's Nisi Prius*, 256; 13 *Viner's Abridgment*, 206, *Feoffment*, (F. a), pl. 5., citing Lord Coke in *Isack v. Clarke* (a). In *Doe dem. Wilkins v. The Marquis of Cleveland* (b) it was held that the possession by the feoffee for less than twenty years was not sufficient to justify even a jury in presuming the fact of livery; and, further, that a memorandum endorsed on the feoffment, and witnessed, to the effect that the attorney appointed in the deed to deliver seisin had done so, was not evidence of the fact for the plaintiff, though the defendant, in pursuance of a previous agreement, produced the deed at the trial, it not being shewn that the defendant claimed under it. In the present case, the proof that the defendant claims under the deed rests, in like manner, merely on his possession of it. Fifthly. The plaintiff could not, by abandoning the demise of *Margaret Williams*, exclude evidence of the deed of 1824. After her title had been opened, and the case for the plaintiff closed, and the address to the jury by the counsel for the defendants concluded, the defendants had a right, of which they could not be deprived, to treat her as a party on the record.

1836.

DOE dem.
ROWLANDSON
against
WAINWRIGHT.

(a) 1 *Roll. R.* 132.(b) 9 *B. & C.* 864.

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DOX dem.
ROWLANDSON
against
WAINWRIGHT.

LORD DENMAN C. J. So far as *Margaret Williams's* demise is concerned, she ceased to be lessor of the plaintiff by that which properly took place at the trial: her title was withdrawn, which put an end to all that depended upon her being a legal party on the record (a). *Jeremiah Williams's* title, under the feoffment, was proved by secondary evidence of the feoffment. We cannot take into consideration the custom of depositing deeds with bankers, in discussing the objection to the sufficiency of the notice to produce. As to the abstract, it was prepared at the time of the conveyance by *Houghton*, who, being in possession of the premises and the feoffment, sold to the defendant: is it therefore unreasonable to say that the abstract was admissible, for that the defendant did claim under *Houghton*, and *Houghton* under the feoffment? This disposes equally of the point as to calling the witnesses, and that as to the livery of seisin.

PATTESON J. As to the admission of the abstract, the notice was clearly sufficient, unless for the reason suggested by Mr. *Nevile*, which we cannot speculate upon. Whether, if the existence of a copy had been proved, it would have been sufficient to produce the abstract, I do not say. Here the existence of a copy was not proved. Then, the abstract being evidence, the question is, whether the subscribing witness ought to have been called. That depends upon the question, whether the defendant claimed under the feoffment. Mr. *Nevile* does not say that, if the defendant had produced the feoffment, the witness must have been called; then

(a) See *King v. Baker*, 2 A. & E. 333.

it would have appeared that the defendant claimed under it. Now, it being shewn that the defendant, at the time of taking possession, received the feoffment, and took a conveyance, or, if there was no conveyance, at all events that the feoffment was handed over to him, he must be considered as having taken possession under the feoffment. The same observation applies to the question as to the livery of seisin. For, if the feoffment were itself produced, with livery of seisin endorsed upon it, it would not be necessary to prove the livery, because the defendant claimed under the feoffment, and the jury, in finding for the plaintiff, must be understood to have found livery of seisin. With respect to the deed of 1824, as long as *Margaret Williams's* name was on the record, the deed was evidence to shew that the estate was out of her. But *Jeremiah Williams* had the legal estate: on the issue upon his demise, therefore, the deed was of no effect by way of conveyance.

1836.

—
Dor dem.
ROWLANDSON
against
WAINWRIGHT.

WILLIAMS J. We are not called upon to say how far the abstract would have been evidence, if the existence of a copy had been shewn. When secondary evidence is let in, evidence is let in which is inferior to writing in weight and importance; and parol and written evidence are equally admissible as secondary evidence. Here, however, no copy has been shewn to exist; and the abstract is clearly evidence. As to the sufficiency of the notice, I recollect that there was once a supposition that notice given during the Assizes was too late, as if the same rule were applicable to the assizes for *Yorkshire*, and to the assizes for *Rutland*. The question is, whether there has been reasonable time.

CASE IN MICHAELMAS TERM

... of livery of seisin, and the calling the sub-
... witness, were both dispensed with by the proof
... defendant claimed under *Houghton*. *Houghton*
... possession; and the feoffment must have been handed
... to him for some purpose, and, if so, as part of the
... case.

COLERIDGE J. As to the sufficiency of the notice,
I always thought that, on such a question, the Judge
was in some sort both judge and jury, and must satisfy
his own mind, as he must on the questions whether
there has been a reasonable search for a document, and
the like. Now the assizes at *Liverpool* lasted a fort-
night, and all parties resided there. As to the question
whether it became necessary to call the attesting witness,
I thought I must see whether the case came under the
principle of those in which a party claiming under a
deed produces it. A man of the name of *Houghton* is
found in possession of the property, and also of the
feoffment: it then appears that there has been a sale
by him to the defendant, and an abstract, comprising
the feoffment, prepared on that sale; and that the
feoffment is handed over to the defendant, who is in
possession. Under these circumstances, it is not enough
for the defendant to say, I do not claim under the deed,
the circumstances most clearly shewing *prima facie* that
he does so claim. It was therefore not necessary to pro-
duce the attesting witness. As to the question of a copy,
I adopt what has been already said: the point does not
arise for decision. But, if a copy had been produced,
parol evidence would have been necessary to shew that
it was a copy. The question as to proof of the livery of
seisin,

scin, which was endorsed and attested on the deed, turns upon the same point which decides the former question, namely, whether the party claimed under the deed.

1836.

Deo dem.
Rowlandson
against
Wainwright.

The rule was refused on the above points, but the Court, during the term, granted a rule nisi for a new trial on another ground.

JONES *against* READE.

Saturday,
November 5th.

DEBT. The declaration stated that the defendant was indebted to the plaintiff in 95*l.*, for work and labour of the plaintiff, done and performed "as the attorney and solicitor of and for the defendant, and upon his retainer, and at his request, and for fees due and of right payable to the plaintiff in respect thereof," and for journeys and attendances about the defendant's business and at his request, and in 95*l.* for money paid, and in 95*l.* on an account stated.

Plaintiff declared in debt for work and labour performed as an attorney for defendant, on his retainer, and for fees due and of right payable in respect thereof; defendant paid a sum into Court, and pleaded non indebitatus as to the residue. Held, that defendant might prove that the plaintiff agreed to do the work (on a certain event, which had occurred) for costs out of pocket, which should not exceed a sum named.

The defendant pleaded *nunquam indebitatus*, except as to 28*l.* 2*s.* 8*d.*; as to 15*l.*, parcel of the said 28*l.* 2*s.* 8*d.*, a set-off; and the residue, 13*l.* 2*s.* 8*d.*, he paid into Court. The plaintiff admitted the set-off, and entered a *nolle prosequi* as to the 15*l.*; he took the 13*l.* 2*s.* 8*d.* out of Court, and averred that the defendant was indebted to him, *ultra* 28*l.* 2*s.* 8*d.*

On the trial before *Vaughan J.* at the last *Chester Assizes*, the plaintiff proved a demand, to the amount of 95*l.*, for conducting on behalf of the defendant, and upon his retainer, an action of ejectment, which was unsuccessful. In answer to this case, the defendant

1836.

 JONES
against
READE.

proved that the plaintiff had engaged, if the action failed, to charge only the sum expended by him out of pocket, which should not exceed 25*l.*; and it was admitted that the set-off and money paid into Court more than covered the money out of pocket. The counsel for the plaintiff objected to evidence being given of such a contract; but the learned Judge received it, and the defendant had a verdict. His Lordship then gave leave to the plaintiff to move to enter a verdict for the taxed costs above the 28*l.* 2*s.* 8*d.*

John Jervis now moved accordingly. First, by the rules *Hil. 4 W. 4. Pleadings in particular Actions*, II. 3. (a), the plea of *nunquam indebitatus* in debt has the same effect as *non assumpsit* in *assumpsit*; that is, by the same rules, I. *Assumpsit* 1. (b), it "operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." It may be inferred from *Edmunds v. Harris* (c) that the defendant, under such a plea, could not avoid the original and direct liability charged in the declaration, by shewing a separate contract to receive payment to a particular extent only. [Lord *Denman* C. J. That case is overruled (d).] At any rate, the payment of money into Court admits the contract as laid. Now the contract laid is for work done in the character of an attorney, on the defendant's retainer; and the right to recover fees is alleged. This is inconsistent with the contract set up by the defendant. [*Patteson* J. For work done as an attorney, the plaintiff might declare simply as for work and labour.] In that

(a) 5 B. & Ad. viii. (b) 5 B. & Ad. vii. (c) 2 A. & E. 414.

(d) See *Hayelden v. Staff*, *antè*, p. 153. and the cases there cited.

, the present argument could not be urged : but here plaintiff does not simply so declare ; and from the manner, which is admitted, and the character of the plaintiff, the law raises a right to certain legal fees, which can only be avoided by an express inconsistent agreement : such agreement should be pleaded.

Lord DENMAN C. J. The issue is as to the amount of the debt : that raises the question, what the contract is. If it be other than that laid in the declaration, why does not the defendant shew this ?

ATTESON J. The fallacy lies in assuming that a contract done in the character of attorney cannot be done in a contract such as that set up by the defendant.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

1836.

JONES
against
READE.

1836.

Saturday,
November 5th.

DOE on the joint Demise of BURGESS and HARRISON against THOMPSON.

Copyhold property, in a manor belonging to the see of *Ely*, was surrendered to *B.*, who was admitted on this surrender, at a court purporting to be a court of *J.* Bishop of *Ely*, lord of the manor. At the time of the admission, no grant of the temporalities had been made to *J.* since the death of the preceding bishop; nor had *J.* been confirmed. Held, that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act, but in pursuance of a surrender.

W. being owner in fee of certain lands, *I.* occupied them for twenty years, and until his own death, which was before *W.*'s death. After *I.*'s death, his widow, and afterwards the defendant, who was eldest son of *I.*, held on, till and after the death of *W.*, and until ejectment was brought by *W.*'s devisee, within five years of the passing of stat. 3 & 4 *W.4.* c. 27. The jury found that the possession was not adverse to *W.*: Held, that the lessor of the plaintiff was not barred by sects. 2 and 7, but had five years from the passing of the statute, under sect. 15; and that the defendant could not resist the action on the ground that, having had no notice, he still continued tenant at will.

EJECTMENT for lands in *Cambridgeshire*. The declaration was of *Easter* term, 1836. On the trial before *Tindal* C. J., at the last *Cambridge* assizes (*July* 25th), it appeared that the lands were partly copyhold and partly freehold; that the lessors of the plaintiff were devisees in trust of all the premises under the will of *William Thompson*; and that the defendant was the eldest son of *James Thompson*, deceased, who was the eldest son of *William Thompson*. The will was proved; and it appeared that the copyhold land was part of the manor of *Ely Barton*, which is a manor belonging to the see of *Ely*; that the lessors of the plaintiff had, after the death of *William Thompson*, sold it to *Susannah Thompson*, who had been admitted on the 22d of *April* 1835; and that she had afterwards made a surrender of it to the lessors of the plaintiff, to be void on her payment of 45*l.* and interest upon a day named. The lessors of the plaintiff were admitted in pursuance of this surrender. This admission was produced, and purported to be made on 19th *July* 1836, at the Special Court Baron of the Right Reverend *Joseph*, Lord Bishop of *Ely*, Lord of the manor of *Ely Barton* in the county of *Cambridge*. It appeared, further, that *James Thompson*,

the

son and heir of the devisor *William Thompson*, and
 er of the defendant, had occupied all the premises
 ht to be recovered for more than twenty years
 re his, *James's*, death, which took place in *February*
 1. *William Thompson* died in *September 1833*.
 n *James's* death, his widow continued in possession
 he lands for some time; when the defendant took
 ession, which he has ever since held. It was ad-
 ed that *William Thompson* was absolute owner of
 he premises, unless the occupation above-mentioned
 ed him. The jury found expressly that *James*
Thompson held and occupied the lands for more than
 ty years before, and at the time of, his death, but
 the possession was not adverse to *William Thomp-*
 and the plaintiff had a verdict for all the premises.

1836.

DR dem.
 BURGESS
 against
 THOMPSON.

unning now moved (*a*) for a rule to shew cause,
 a nonsuit should not be entered, or a new trial had.
 h respect to the copyhold property claimed under
 surrender from *Susannah Thompson*, he produced an
 avit, by which it appeared that *Dr. Bowyer Edward*
ke, late Bishop of *Ely*, died in *April 1836*; and that
Joseph Allen, his successor (previously Bishop of
Stol), was confirmed on the 17th of *August 1836*;
 that the restitution of the temporalities to him was
 d 19th *August 1836*. The Court could not be
 , as a court of the Bishop, while the temporalities
 e in the hands of the Crown, 1 *Burn's Eccl. L.* 226,
tops, VI. 3. (ed. 8th.); and, consequently, there
 no title in the lessors of the plaintiff at the
 of the trial. [*Coleridge J.* Should you not have
 n this point at the trial?] The defendant could

Before Lord Denman C. J., Patteson, Williams, and Coleridge J.

1836.

—
 DOR DEM.
 BUCKLES
 against
 THOMPSON.

not know how the plaintiffs would make out their title, and therefore could not be prepared with evidence in support of the objection; which, however, was made in general terms, as it was a matter of notoriety that Dr. *Allen* was even then sitting in parliament as Bishop of *Bristol*. Then, with respect to the whole property, the possession not having been adverse, *James Thompson* in his life-time, and the defendant since, were tenants at will; so that the title of *William Thompson* had accrued more than twenty years before the action; stat. 3 & 4 W. 4. c. 27. s. 7. The plaintiff is therefore barred by sect. 2. It will be contended that sect. 15 gives the right of recovering for five years from the passing of the act. But, first, the "acknowledgment" mentioned in that section would be a complete determination of a tenancy at will; and, secondly, a tenancy at will could not be an "adverse" possession. That section therefore does not control the 7th, but provides only that mere lapse of time shall not bar a recovery, till five years after the passing of the act, when the possession has not been adverse: it leaves the legal rights of the parties in other respects as they were before. But the defendant is, even on this supposition, not a trespasser, but still tenant at will; for the devise by the owner of the fee, being an act done off the land without notice to the tenant, is not a determination of the tenancy; *Co. Litt. 55 b., Com. Dig. Estates* (H. 6.); and the action therefore is brought too soon, there having been no notice or demand of possession. (He also moved for a new trial, on the ground that the verdict was against the weight of evidence.)

Cur. adv. vult.

In the same term (*November 24th*),

Lord

Lord DENMAN C. J. delivered the judgment of the court. One ground of this motion was, that the verdict was against evidence. As to this, neither the Lord Chief Justice nor we are dissatisfied with the verdict. When it was said that improper evidence was admitted. It appeared, on affidavit, that the lessors, who claimed devisees under the will of *William Thompson*, had been admitted at a Court held by the steward of the manor, as steward, and in the name, of the present Bishop, before any grant to him of the temporalities. This was an admission in pursuance of a surrender, and what by statute is equivalent thereto, and not a voluntary grant, we think the lord's title immaterial, and that there is nothing in the objection (a). It was not contended that, under stat. 3 & 4 W. 4. c. 27. s. 2. & 7., the possession of twenty years, by *James*, barred the devisees. But the jury have found that the possession was not adverse to *William* the testator; and, as the action is brought within five years after the passing of the statute, the proviso of the fifteenth section saves this right.

Rule refused.

(a) See 1 *Scriv. Cop.* 118. part 1. ch. 3. 3d ed.

MARTIN *against* STRONG, Clerk.

Tuesday,
November 8th.

CASE for slander. The declaration stated that the plaintiff had been retained by *Joseph Woollen*, a midwife at *Painswick*, in his service and employ-

ment the conduct of a medical man in his attendance upon the objects of the charity, are merely on account of those circumstances, a privileged communication.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber, respectively, are

ment

1836.

MARTIN
against
STRONG.

ment as such man-midwife, and that *J. W.*, but for the committing &c., would have retained him in his service, and would have given him a certificate of good and moral conduct at any time when he should have quitted that service; that, before the committing &c., there was a charitable society at *P.* for the relief of poor women, inhabitants of *P.*, during their pregnancy; that *J. W.* was man-midwife to the society, and the plaintiff from time to time attended the patients, as assistant to *J. W.*; that the defendant, wishing it to be believed that the plaintiff had conducted himself unchastely and immorally towards the patients, in a conversation between the defendant and one *Mrs. Hicks*, concerning the plaintiff, and his conduct in his attendance, falsely, &c., spoke and published &c. (with inuendoes as to persons), "I am quite satisfied with his professional skill: but I can assure you the poor women are quite terrified at the thought of having him; and one poor woman said she quite shuddered at his name being mentioned;" and the defendant, being asked by *Mrs. H.* what the plaintiff had done, falsely, &c., answered, "it is too bad to mention;" by which the defendant meant that the plaintiff had been guilty of improper and immoral conduct in his attendance. Other words to the same effect were charged; and special damage was alleged, that *J. W.* had refused to retain the plaintiff in his service, and to give him a certificate of his good and moral conduct at his quitting; whereby the defendant was prevented from applying to the Court of Examiners of the Apothecaries' Company to be admitted to an examination for the purpose of obtaining a certificate to practise as an apothecary.

Plea, Not Guilty (with other pleas not material here).

On

On the trial, before *Littledale J.*, at the last *Gloucestershire Assizes*, it appeared that a meeting of the subscribers to the institution had been held for the purpose of determining whether Mr. *Woollen* should continue to be the sole accoucheur to the objects of the charity; that the defendant, who was a subscriber, was chairman; and that, either after or before he had left the chair, Mrs. *Hicks*, a subscriber, questioned the defendant as to some complaints which had been made, during the meeting, against the plaintiff with respect to his attendance upon the charity. The defendant answered, that he did not object to the plaintiff's professional character. Mrs. *H.* then asked what the objection was; to which the defendant replied, that it was too bad to name, and that he could not tell her. Mrs. *H.* then said, "I insist upon it: being one of the members of the society, I have a right to know." Upon which the conversation took place, substantially as set out in the declaration. The learned Judge told the jury that, supposing all which passed during the meeting to be in the nature of a privileged communication, the meeting was not necessarily over when the defendant left the chair: and he desired them to consider, whether the conversation was fairly a part of the proceedings of the meeting. The jury found for the plaintiff, damages 100*l.*

Sir *W. W. Follett*, in this term (*a*), moved for a new trial, on the ground of misdirection, and of the verdict being against evidence; and he insisted that a communication made, *bonâ fide*, by one member of the charity

(*a*) Nov. 4th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

1836.

MARTIN
against
STRONG.

to

1836.

 MARTIN
 against
 STRONG.

to another, in answer to inquiries by the latter on matters relating to the charity, was privileged, although not made during a formal meeting; and that the jury should have been asked whether there were any circumstances rebutting the presumption in favour of privilege. He cited *Toogood v. Spyring* (a), *Wright v. Woodgate* (b), *M'Dougall v. Claridge* (c), *Bromage v. Prosser* (d). [Lord Denman C. J. You set up a very large claim of privilege; there may be a thousand subscribers to a London charity.]

Cur. adv. vult.

On this day, Lord Denman C. J., after adverting to another objection to the learned Judge's charge (not mentioned above), and stating that it was founded on a misapprehension of what his Lordship had said to the jury, added, It is also said that the parties had a right to enter into the discussion simply as subscribers to the charity. We do not accede to that: such a claim of privilege is too large.

Rule refused.

(a) 1 Cr. Mee. & R. 181. S. C. 4 Tyrwh. 582.

(b) 2 Cr. Mee. & R. 573. S. C. Tyrwh. & Gr. 12.

(c) 1 Camp. 267.

(d) 4 B. & C. 247.

1836.

The KING *against* JOULE.Tuesday,
November 8th.

THIS was an indictment for obstructing a common King's highway. The bill was found at the last quarter sessions for *Salford*.

Wightman for the defendant now moved for a certiorari, on an affidavit in which it was stated that the place in question had been long used by the defendant as a yard to his brewery, and that there was erected over part of it a building of the defendant, which had been built for thirty or forty years, and the enjoyment of which was very important to him; that, on the trial, the question would be whether the alleged highway were such; that the indictment was preferred at the instance of commissioners of police, acting for the township of *Salford*, and the surveyors of the highways, all residing in the neighbourhood of the place where the trial would be had, and of the alleged obstruction; that the deponent believed that their influence would prejudice the case if it were tried at the quarter sessions; and that he "is advised and believes that it will be proper, as well on account of the value of the object of the indictment, as of the questions of matter of fact and points of law which may arise, to have the same indictment tried by a special jury." *Wightman* now urged that the affidavit shewed grounds for the removal, especially as it suggested that there would be points of law to be determined. [*Williams J.* What points do you suggest as likely to arise?] It is not necessary to specify them on such an application; but it is clear that

a question

A defendant, applying to remove an indictment from sessions by certiorari, on account of the probability that difficult points of law will arise, must state in his affidavit specific grounds on which legal difficulties will occur; it is not sufficient to shew that the obstruction complained of by the indictment consists of buildings of great value, which have stood thirty or forty years.

1836.

The King
against
Jesse.

a question of non-user may, and probably must, arise. [*Patteson* J. It will be a mere question of fact, highway or not.] That will probably raise difficult questions, whether the public rights (if any) have been affected by non-user. This is practically a trial of ejectment for property of great value.

PATTESON J. (a). You must shew specific grounds upon which legal difficulties will arise. The practice of allowing removals has perhaps been too lax.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

(a) Lord Denman C. J. was absent.

Tuesday,
November 8th.

DOE on the Demise of STILWELL against
MELLERSH.

A surrender of copyhold lands in the manor of *F.* was proved to have been taken by *S.*, who stated that he held the office of clerk of the Castle of *F.*, which was in the manor, by patent from the lord; that there was a custom for him to take surrenders; that the steward also took them, and that he, *S.*, had a concurrent jurisdiction with the steward. The patent contained no authority to that effect. Held, evidence for a jury that *S.* was entitled by custom to take the surrender.

EJECTMENT for copyhold premises in *Surrey*. On the trial before Lord Abinger C. B., at the last *Guildford* assizes, it became necessary for the plaintiff to prove that a surrender had been taken of the premises at the copyhold court of the manor of *Farnham*, in which manor the premises were situate. It appeared that the surrender was taken by a person named *Shotter*, who described himself as clerk of the Castle of *Farnham*, which is within the manor, and said that he derived his authority from the Bishop of *Winchester*,

the

the lord of the manor. He produced a patent, dated 1796, but which did not authorise him to take surrenders. He added, that there was a custom for him to take surrenders; that the steward of the manor also took them, but that the witness had a concurrent jurisdiction; and that the admittances were taken by the steward, who kept them, and from time to time sent the witness a copy of them. It was objected that this was not evidence of a valid surrender; but the Lord Chief Baron said that, with a custom, such a surrender was sufficient; and the plaintiff had a verdict.

Wordsworth now moved for a rule to shew cause why there should not be a new trial. The surrender was not formally taken. It does not appear that *Shotter* was an officer of the Court, or even a member of it. The law recognizes such surrenders only as are taken by the lord, or his steward, or the deputy-steward. These, with the tenants, constitute the whole court. [Lord Denman C. J. They might be taken by two copyholders.] For that there must be a custom; and so there must for the taking a surrender by any one except the lord, or his steward, or deputy-steward. Here, the assertion of *Shotter*, that there was a custom for him to take them, could import only that he himself had been in the habit of taking them, which is the very practice, the legality of which is in question. The cases are collected in 1 *Scriven on Copyholds*, 153, Part I. ch. 4. (ed. 3d.). There is no authority for holding such a custom good; and the custom in point of fact is not established by legal proof.

1836.]

For term.
Stilwell
against
Mellish.

Lord

1836.

DOE dem.
STILWELL
against
MELLERSH.

Lord DENMAN C. J. Here is a person holding an office connected with the manor, who states that there is a custom for him to take surrenders. I know no rule of law contrary to such a custom ; and there was evidence for the jury of its existence.

PATTESON J. He is a sort of deputy-steward for this purpose.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

1836.

GILBART and Another *against* DALE.*Tuesday,*
November 8th.

ASSUMPSIT. The declaration stated that defendant, before and at the time of the making of his promise, &c., was possessed of a certain booking-office, for the booking and receiving and taking care of boxes and parcels, in order that the same might be forwarded to the several persons to whom the same might respectively be directed; and, defendant being so possessed &c., the plaintiffs heretofore, to wit 5th June 1833, at the special instance and request of defendant, delivered to said defendant, so being possessed &c., a certain box of said plaintiffs of great value, to wit &c., and containing divers goods and chattels, to wit &c., of said plaintiffs of great value, to wit &c., to be by him, the said defendant, taken care of, in order that the same might be forwarded to a certain person to whom the same was then directed, to wit, to one *Thomas Jeffries, Esquire, Cott Moor, near Pembridge, South Wales*; and, on consideration thereof, and of certain reward to said defendant in that behalf, then paid by said plaintiffs to said defendant, he, the said defendant, being so possessed of the said booking-office as aforesaid, undertook &c. to take care of the said box, and of the goods and chattels therein, in order that the same might be forwarded to the person to whom the same was then directed, to wit to &c.; and, although said defendant, as such possessor of the said booking-office as aforesaid, had then had and received the said box, and said goods and

In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby consignor lost his goods, it is not sufficient to prove that they never reached their destination or were accounted for. The office-keeper's duty is to deliver to a carrier; and some evidence must be given, shewing specifically a breach of that duty.

A tradesman, having made up goods by order, delivered them at a booking-office, with the customer's address, and booked them, to be forwarded to him, not specifying any particular conveyance, and no particular mode of transmission having been pointed out by the customer. *Quære*, whether the consignor could maintain an action against the office-keeper for a negligent loss of the goods while under his charge?

1836.

 GILBART
 against
 DALE.

chattels therein for the purpose aforesaid, yet defendant, not regarding his duty in that behalf, nor his said promise &c., but contriving &c., hath not taken care of the said box, or of the goods and chattels therein, in order that the same might be forwarded as aforesaid; but, on the contrary, defendant, being so possessed of the said booking-office as aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said box, and the goods and chattels therein, that, by and through the mere carelessness, negligence, and improper conduct of defendant in this behalf, the said box and goods were lost to the plaintiffs, &c. Pleas. 1. Non assumpsit. 2. That defendant did take care of the box and goods, and that the same were not by the carelessness &c. of defendant lost to plaintiffs in manner and form &c.: conclusion to the country.

On the trial before Lord *Denman* C. J., at the sittings in *Middlesex* after last *Trinity* term, it appeared that the defendant was the proprietor of a general booking-office (at the *Gloucester* coffeehouse, *Piccadilly*); and that the plaintiffs, who were tailors, left at the defendant's office, and paid twopence for booking, a box of clothes made by them for a customer, and addressed to him as stated in the declaration. No direction was given as to any particular conveyance; and it did not appear that any desire had been expressed on the subject by the consignee. The box never reached its destination or was accounted for. Upon this evidence it was objected: first, that the action ought to have been brought by the consignee (*Dutton v. Solomonson* (a), notes to *Wilbraham v. Snow* (b)); secondly, that

(a) 3 B. & P. 582.

(b) 2 Wms. Saund. 47 k. note (1), and note [u], 5th ed.

appeared to have been the defendant's duty not to carry, but to deliver to a carrier, and that the non-arrival of the goods at their destination did not prove a breach of that duty; *Newborn v. Just* (a), *Upston v. Mark* (b). The Lord Chief Justice directed a nonsuit on the points taken, and refused the plaintiffs' counsel leave to move to enter a verdict.

1836.

 GILBERT
against
DALE.

Platt now moved for a new trial. First, under the new rules of pleading, the property in the goods was not put in issue by the plea of non assumpsit: [*Cole-ridge J.* Is not the delivery of a box "of the plaintiffs" one of "the matters of fact from which the contract or promise alleged may be implied by law?" (c). *Patten v. J.* If the defence is, that the contract was not a contract with the plaintiffs, that is clearly raised by the plea of non assumpsit. Lord *Denman C. J.* If that defence is proved, the contract was not made modo accedens as alleged.] Secondly, the property was in the plaintiffs originally, and was not out of them, according to the authorities cited on the trial, until there had been delivery to a carrier. Here they were merely deposited for the purpose of being so delivered. There had been no such acceptance of them by the consignee, and would have been required by stat. 29 Car. 2. c. 3. s. 17.; *Hanson v. Armitage* (d). In *Davis v. James* (e) and *Moore v. Wilson* (g) the carrier's contract was held

(a) 2 Car. & P. 76.

(b) 2 Car. & P. 598.

(c) *Reg. Gen. Hil. 4 W. 4. Pleadings in particular Actions*, I. Assumpsit, 1. 5 B. & Ad. vii.

(d) 5 B. & Ad. 557.

(e) 5 Burr. 2680.

(g) 1 T. R. 659. See the remarks on these cases in *Dawes v. Peck*, 1 T. R. 330. *Long on Sales of Personal Property*, ch. vii. p. 168. And the cases collected in a note to *Coggs v. Bernard*, in *Smith's Leading Cases*, 103.

1836.

 GILBART
 against
 DALE.

to be with the consignor. [Lord *Denman* C. J. No doubt that may be so, under some circumstances. In *Moore v. Wilson* (a) a contract with the consignor must have been proved.] Thirdly, the plaintiffs made a sufficient *primâ facie* case against the defendant by proving that the box never arrived. In the case of a carrier that would have been clear; *Griffiths v. Lee* (b): and it cannot be said, here, that the plaintiffs ought to have sued the carrier; for it was not within their knowledge who the carrier was, if the goods were entrusted to one.

PATTESON J. It is unnecessary to give any opinion on the point as to the consignor's title to sue, because the nonsuit was clearly right on the second ground of objection. Was there any evidence to sustain the charge of negligence against this defendant? Let us look at the contract. The defendant was not a carrier, but keeper of a booking-office. His contract was, to take care of the box, that it might be forwarded, that is, that it might be delivered to some carrier, to be conveyed to its destination. To shew a breach of that undertaking by the defendant, it should have been proved by direct evidence that the box was taken away while in the booking-office, and lost, or that it was never delivered to any carrier. No such evidence was given. All the proof was, that it did not arrive at its destination: but, in this case, non-delivery to the consignee was not sufficient. The decision in *Griffiths v. Lee* (b) is correct, as applied to the case of a carrier, but not to that of a book-keeper. The default to be

(a) 1 T. R. 659.

(b) 1 Car. & P. 110.

proved

oved against him was, non-delivery of the goods to a carrier.

1836.

GILBERT
against
DALE.

WILLIAMS J. I am of the same opinion. A carrier must discharge himself of his contract by delivering the goods to the consignee. Here the contract was, to deliver them to a carrier; and the evidence leaves it undecided, whether the goods were lost in the defendant's hands, or were delivered to a carrier and lost by him. There is, therefore, no sufficient proof of negligence in the defendant.

COLERIDGE J. In the case of a carrier, the law presumes that he will do his duty; and a plaintiff, who charges him with the breach of it, must give some evidence of non-performance. The fact, that the goods have not reached the consignee, is such evidence against the carrier, and calls upon him to discharge himself by other proof. So in the case of the keeper of a booking-office; to call on him for an answer to such a charge at the present, some evidence must be given of the non-performance of his undertaking: but that is not done by merely shewing [non-delivery of the goods to the consignee. Suppose goods were left with a carrier to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to shew that the goods did not reach Edinburgh?

Lord DENMAN C. J. concurred.

Rule refused (a).

(a) See *Syms v. Chaplin*, p. 634, post. That case, so far as it bears on the present, was decided before it, November 2d.

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Tuesday,
November 8th.

LILLY against HAYS.

A debtor of plaintiff transmitted a sum of money to defendant, who admitted having received it, and, being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it. These statements were communicated to plaintiff, by defendant's authority.

Held that, on his failing to pay, plaintiff might sue him for money had and received, and that defendant could not allege a want of consideration moving from plaintiff to himself.

ASSUMPSIT for money had and received, and on an account stated: plea, non assumpsit. On the trial before Lord Denman C. J., at the sittings in London after last Trinity term, it appeared that the plaintiff had lent 100*l.* to a Mr. Wood on his acceptance. Wood also owed money to the defendant. The bill was at two months; dated June 15th, 1833. When it became due, Wood was in Scotland. Some days after the maturity of the bill, the defendant said to a witness, that he had received 100*l.* from Wood, but did not know exactly what bill it was to take up. The witness deposed to another conversation at which he was present, between defendant and plaintiff, when defendant said that he had received some money from Wood, but Wood owed him 40 or 50*l.* Another witness, named Browning, stated that, having received a letter from Wood about the end of August, 1833, he called on the defendant and said to him, "I have heard from Mr. Wood with regard to the bill, about what you before spoke of to me." (He explained this as referring to an occasion on which the defendant had told Browning that he had received a 100*l.* bill, and asked him what he should do with it, saying that he had had no specific directions, that Wood owed him money, but it could not be for that, as it would not be due for some months.) Browning further stated, in continuation of his evidence as to the conversation in August 1833, that he then told defendant that Wood said the 100*l.*

as for *Lilly* (the plaintiff); upon which defendant said it should be immediately paid. The defendant's counsel objected that there was no proof of the defendant having authorised either of the witnesses to communicate the above statements to the plaintiff; and that nothing had been shewn upon which the plaintiff could ground a promise by the defendant to pay him the 100*l*. The Lord Chief Justice reserved leave to move to enter nonsuit; and he left it to the jury, whether or not the defendant had authorised a statement to the plaintiff that he had received 100*l*. to his use. The jury found for the plaintiff, damages 100*l*.

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Kelly now moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had. There was no consideration, moving from the plaintiff to the defendant, for a promise by the latter to pay the 100*l*. as received to the plaintiff's use. The rule, to be collected from *Williams v. Everett* (a) and other cases, is, that an action for money had and received does not lie where money has been sent to the defendant with a direction to pay it to the plaintiff, unless something further has been done, before the commencement of an action, to constitute a privity between the defendant and the plaintiff. Here no distinct proof was given that the defendant had authorised any one to tell the plaintiff that he had received the money on his account, and could pay it to him. *Wood* might have recalled the 100*l*. at any time while it remained unpaid; the defendant held it to his use (b). The doctrine that,

(a) 14 *East*, 582.(b) See *Stephens v. Badcock*, 3 B. & Ad. 354.; *Daron v. Husband*, 3 B. & Ad. 611.; *Howell v. Batt*, 5 B. & Ad. 504.

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in assumpsit, the consideration for the promise must move from the plaintiff, is illustrated in 1 *Selw. Ni. Pr.* 52. (a); where *Bourne v. Mason* (b) and *Crow v. Rogers* (c) are cited, in which cases it was held that no foundation was laid for a promise, the consideration moving from a third person; and that was the ground of decision in *Price v. Easton* (d). So, here, the only consideration shewn is, that the defendant received 100*l.* from *Wood*.

PATTESON J. It appears in this case that the defendant had stated, in effect, that he held the 100*l.* to the plaintiff's use; and had allowed him to be told so. The only question is upon the alleged want of a consideration moving from the plaintiff. It is true that the rule of law requires such a consideration in all cases, though, in an action for money had and received, a direct consideration moving from the plaintiff is seldom shewn. But, suppose that a debtor sent money to a general agent for the creditor, would there be any doubt that, as soon as the agent received it, he would be accountable to the creditor for it, as money had and received to his use? Would it be an answer, that there was no consideration moving from the creditor to the agent? Or is it not a consideration, if the money is sent to a general agent for the creditor, and received by him, he informing the creditor of it? That is the case here. The money was sent by *Wood* to the defendant; he admitted holding it for the plaintiff's use, and said he would pay it him. There is a consideration moving here, through the instrumentality of *Wood*, the original debtor, to the defendant, as agent for the plaintiff.

(a) *Assumpsit* I. (Ed. 9.)(b) 1 *Ventr.* 6.(c) 1 *Stra.* 592.(d) 4 *B. & Ad.* 433.

WILLIAMS J. I am of the same opinion. The defendant here admits the receipt of the money on the plaintiff's account, and is adopted by him as his agent.

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COLERIDGE J. The facts here shew that the defendant was the agent of the plaintiff; that agency supplies consideration. To constitute an agency there must have been an agreement, either express, or to be inferred from what has been said on one side and adopted on the other.

Lord DENMAN C. J. I am of the same opinion. I thought that the defendant had made himself the plaintiff's banker as to this 100*l*.

Rule refused.

PARRY *against* DEERE.

 Tuesday,
November 8th.

ASSUMPSIT for use and occupation of a messuage and land, and of certain other land. Pleas, the general issue and a set off. On the trial before Little J., at the last Summer assizes for Berkshire, it appeared that the premises in question were demised by a written agreement, which was as follows:— "Mrs. Parry agrees to let to Mr. John R. Deere, Donnington Priory, with twenty-five acres of land thereto belonging, lately occupied by Admiral Bertie, with all rights and appurtenances to the house and lands and premises adjoining, from the 25th day of March instant, for the term of years, and of the rent paid by the above-mentioned tenant, the amount of which was proved by witnesses. Held, that the document was rightly stamped, and properly admitted in evidence.

By the same agreement close A. was demised at a rent of 200*l*. a year, and close B. at the same rent which was paid by the tenant then in possession, not otherwise describing the amount. The agreement was produced in evidence, with an ad valorem stamp on the annual sum made up of

term

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term of fourteen years, at the rent of 200*l.* for the first ten years of the said term, and at the rent of 210*l.* for the remainder of the said term, to be paid half-yearly." (Then came a clause not material, and after it the words following.) "Mrs. *Parry* also agrees to let to Mr. *Deere* the two fields now occupied by Mr. *Sloccock* and Mr. *Holloway*, from *Michaelmas* next, being the end of their present current year therein, at the same rent she now actually receives of them for the same, and for the like term as Mrs. *Parry* agrees to let him the house and premises before-mentioned." *Sloccock* and *Holloway* were called, and proved that, at the time of the agreement, they rented the fields in question, respectively, at 33*l.* and 61*l.* a year. The agreement bore an ad valorem stamp of 3*l.*, and no other (a). *Ludlow* Serjt., for the defendant, contended that the stamp was insufficient. The learned Judge reserved the point, and the plaintiff had a verdict.

Ludlow Serjt. moved in this term (b) for a rule to shew cause why a nonsuit should not be entered. The stamp was insufficient, being an ad valorem stamp in respect of a rent made up of the amount specified in the agreement, and also of an amount not stated there, but to be ascertained by evidence. The stamp act, 55 G. 3. c. 184., schedule, part I., title *Lease*, imposes, for a "lease or tack of any lands, hereditaments," &c., "at a yearly rent, without any sum of money by way of fine, premium, or grassum, paid for the same, where the yearly rent" "shall amount to 200*l.* and not amount

(a) See *Blount v. Pearman*, 1 *New Ca.* 408.

(b) *November 2d.* Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

1000*l.*," a duty of 3*l.*: and for a "lease, or tack of any kind, *not otherwise charged in this schedule*, 1*l.* 15*s.*" Stamp duty is imposed in respect of the consideration appearing on the face of the instrument of demise, not of any consideration which may be shewn by parol; see *Black v. Braddyll* (a). Here it appears on the agreement that part of the premises was demised at a rent of 100*l.* and afterwards 210*l.*; but another part was demised at no stated rent. The instrument, therefore, so far as it regarded that portion, was a lease "not otherwise charged" in the schedule, and liable to a duty of 1*l.* 15*s.* That duty would have been chargeable on a demise of the fields only, drawn in the present form; and parol evidence could not have been admitted to vary the instrument under an ad valorem duty. The agreement here is in effect the same. [*Patteson J.* Then, if the premises had been demised by lease at 1000*l.* a year, and, before the expiration of the term, a new agreement were drawn for a demise upon the same terms as before, but fixing the rent only by reference to the former instrument, you must contend that a stamp of 1*l.* 15*s.* would be sufficient]. The difference to the revenue in such a case is not to be considered. The agreement, not having the proper stamps, was as if the premises had been written on an unstamped paper.

Cur. adv. vult.

LORD DENMAN C. J. now delivered judgment as follows:—In this case an agreement was put in, for the payment of rent, partly rendered certain by the instrument itself, and partly to be ascertained by reference to

(a) *M'Clell.* 217.

the

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the rent paid by tenants then in possession; and my brother *Ludlow* contended that, in respect of this latter rent, the demise came under the description in 55 G. 3. c. 184., schedule, part I., of a "lease" "not otherwise charged in this schedule." We have no doubt that the instrument did not come within that class, and that the stamp was proper. There will therefore be no rule.

Rule refused.

Wednesday,
 November 9th.

The KING *against* HIGGINS.

A party indicted at sessions for obstructing a highway obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial at a subsequent session. The prosecutor attended with his witnesses, and, on the last day of the sessions, before the case was called on, the defendant lodged his certiorari. This Court, under all the circumstances, quashed the certiorari, and ordered a procedendo. But,

Held, that this Court had no power to give

A RULE was obtained in *Michaelmas* term, 1835, calling on the defendant to shew cause why the certiorari issued in this case should not be quashed and a procedendo awarded, and why the defendant should not pay the prosecutor the costs incurred by him in this prosecution at the last quarter sessions for the county of *Hereford*.

The indictment, for obstructing a highway, was preferred, and a bill found, at the *Herefordshire* quarter sessions, *October* 1834. At the next sessions the defendant pleaded not guilty, and entered into recognizances to try. The certiorari was granted by a judge, in *March* 1835, on affidavit by the defendant's attorney, stating, as grounds, that certain points of law would arise on the trial; that the indictment was preferred vindictively; that it would probably be requisite to have a view taken by a special jury; that deponent apprehended a disadvantage from the practice at the

the prosecutor his costs of attending at sessions after the issuing of the

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Hereford sessions of trying the traverses last, when no magistrates remained but those who felt interested in the cases, and on which occasions an undue influence had been exercised in favour of a party active in the present prosecution; and, lastly, that a speedy removal of the indictment was desirable, as the next assizes would fall nearly at the same time with the sessions.

By the affidavits (sworn in *November* 1835), in support of the above application to quash the certiorari, it appeared that the defendant gave no notice of trial for the *April* or *Midsummer* sessions, 1835, but that his recognizances were respited at each sessions; and that, on the last occasion, his attorney was told by the prosecutor that, if defendant did not try at the ensuing sessions, a motion would be made to estreat his recognizances. That the defendant gave notice of trial for the *October* sessions, and in consequence the prosecutor attended there with his witnesses two days, and instructed counsel, the traverse being entered for trial. That on the last day of the sessions, nearly at the close of the business, the certiorari was delivered into court on behalf of the defendant. That the prosecutor had never had any notice of the certiorari having been obtained, nor been served with any countermand of the notice of trial. Other statements were added, respecting the merits of the prosecution, and answering the allegations formerly made as to the supposed use of influence at the sessions.

The defendant's attorney made affidavit in answer, that at the *April* sessions, 1835, the prosecution stood over by consent of the attorneys for the prosecutor and defendant. That in *May* the certiorari was resealed, and made returnable *November* 2d. That, according to the

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the deponent's belief, neither the prosecutor nor his witnesses attended at the *June* sessions for the purpose of trying the traverse, and that deponent was not threatened with an estreat of the defendant's recognizances if he did not try in *October*. That deponent delayed taking any step at the time of the *June* sessions, understanding that new rules were about to be promulgated at those sessions, which would obviate his objection to a trial there. That the new rules (fixing the trial of traverses at an earlier period of the sessions) were made, and, upon the faith of them, he gave notice of trial for the *October* sessions; that he entered the traverse and attended with his witnesses; but that, notwithstanding the new rules, the traverse was deferred till the close of the sessions, when the deponent, apprehending, as before, for reasons which he stated, that he could not have a fair trial, or sufficient assistance of counsel, produced and lodged his certiorari. That the indictment was removed into this Court, where the defendant appeared and pleaded Not Guilty, and issue was joined and notice of trial given for the next assizes, before the affidavits were sworn, or any motion made for the purpose of quashing the certiorari. There was also a detailed statement upon the merits.

Talfourd Serjt. and *Kelly* now shewed cause, and contended, first, that the delay of the defendant in making use of the certiorari, and his manner of using it ultimately, were justified by the facts stated on affidavit. Secondly, that the application here for costs of the proceedings in another court was unprecedented, and the authority of this Court to give them questionable, though it had jurisdiction over the costs subsequent to removal.

Maule

Maule and Greaves, contrà. On the first point, the grounds of excuse stated are insufficient. Secondly, the costs now applied for are those to which the prosecutor was subjected after the granting of the certiorari, and while the defendant had it in his pocket. This court became seised of the cause by the issue of the certiorari, and might, from thenceforth, grant any costs occasioned by an abuse of the writ. In *Stacey v. Mans(a)*, which was a case of removal by certiorari from the Great Sessions of *Caermarthenshire*, under circumstances like the present, the Court of Exchequer, on superseding the certiorari, granted the costs of the day in the Court of Great Sessions. In *Rex v. Curtrum(b)* Lord *Ellenborough* lays it down generally, "the established practice of the Court, that if the prosecutor give notice of trial to the defendant, and does not try his indictment, nor countermand the notice in time, he must pay the costs of the trial as in other cases: for otherwise defendants might be harassed, and oppressed with unnecessary expence." The payment of costs is enforced by the general authority of the Court. In *Rex et Regina v. Allen and Hazard(c)* Holt C. J. said (upon an information for perjury), that "if the prosecutor gives notice of trial" "the next assizes, and does not proceed, the defendant must give costs. If the person indicted gives notice, the prosecutor shall have costs." [*Patteson J.* Those cases refer to costs of proceedings in this Court.] The only question is, when the certiorari attaches. From that time, at all events, this Court has jurisdiction over the costs. The sessions are, in point of law, only one

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(a) 13 Price, 449.

(b) 8 East, 269.

(c) Comb. 225.

day;

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day; and therefore the production of the certiorari may (with reference to the question of costs) be carried back to the commencement of the sessions; and then, according to any view of the subject, the costs incurred at sessions would be within the jurisdiction of this Court. [Lord Denman C. J. referred to *Rex v. Passman (a)*.] There the prosecutor, who produced the certiorari, was not the party who had given the notice of trial; and no attempt had been made to set aside the certiorari, which, as appears by the judgment of the Lord Chief Justice, would have put the case on a different footing. *Jones v. Davies (b)*, there cited, is a good authority in the present case. The costs at sessions might be taxed by the officer of that Court (c). (They also contended that, by stat. 13 G. 3. c. 78. s. 24., no certiorari lay.)

LORD DENMAN C. J. It appears to me that the circumstances of this case entitle the prosecutor to a rule for quashing the certiorari, and for a procedendo, because they shew that justice was not the object in suing out the certiorari. But, as to the other point, I cannot find that we have any power here to award costs of proceedings in another court. *Stacey v. Evans (d)* appears to have been decided, as to this point, on the authority of *Jones v. Davies (b)*; and both decisions are over-ruled by *Rex v. Passman (a)*. We cannot, therefore, grant the costs.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule absolute for a procedendo.

(a) 1 A. & E. 603.

(b) 1 B. & C. 143.

(c) See *Franklin v. Featherstonhaugh*, 1 A. & E. 475.

(d) 13 Price, 449.

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The KING against The Lord of the Manor of *Hexham*, and his Steward. *Wednesday, November 9th.*

A RULE nisi was obtained, in a former term, for a mandamus calling upon *Thomas Wentworth Beaumont* Esq., the lord of the manor of *Hexham*, and *James* Esq., his steward of the said manor, to admit *Richard Errington* to certain copyhold premises within and parcel of the said manor, as the right heir of *Elizabeth Armstrong* deceased, the late tenant thereof, according to the custom of the said manor.

By the affidavits for and against the rule, the following facts appeared. *Elizabeth Armstrong*, being seised of the premises in fee, according to the custom of the manor, surrendered to the use of her will, which will she afterwards made (*April 3d, 1770*), and died. The material devises were, to trustees (who were appointed executors) for a term of ninety-nine years, to cease when the trusts should have been discharged; and, from and after the determination of such term, to *Thomas Scott* for life; remainder to trustees to preserve &c.; remainder to the first and every other the son and sons of the body of *T. S.* successively in tail male; remainder to *William Scott* for life; remainder to trustees to preserve &c.; remainder to the first and other sons of the body of *W. S.* successively in tail male, in the same manner as to the sons of *Thomas Scott*; remainders over (which failed); remainder to the right heirs of the testatrix for ever. *William Scott* (who afterwards took the name of

Where two adverse parties claim title, as devisees, to the same copyhold tenement, the steward may admit both, and, proper grounds being shewn, this Court will require him by mandamus so to do.

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Ord, in obedience to the will), became seised by virtue of the devise to him, and was admitted tenant. He surrendered to the use of his will, which will he made (dated *December 24th, 1824*), and thereby devised the premises in question to his wife *Elizabeth* for her life, remainder to his nieces, *Barbara Poole* and *Elizabeth Poole*, in fee, as tenants in common. He outlived his wife, and died, *November 5th, 1832*, without issue, leaving his said nieces him surviving. The nieces thereupon claimed title to the premises, as devisees in fee of *William Ord*. The present applicant, *Richard Errington*, alleged that, on the death of *William Ord* without issue, he became entitled as the right heir of *Elizabeth Armstrong*, and that the devise by *Ord* to his nieces could not operate, for that he took only a life estate under *Elizabeth Armstrong's* will.

At a court holden for the manor, *June 20th, 1835*, *Richard Errington* and *Barbara* and *Elizabeth Poole* made their respective claims to admittance, whereupon a jury of the homage was sworn, and *Errington* adduced evidence of his being the heir of *Elizabeth Armstrong*. The nieces put in the will of *W. Ord*, and proved the execution. The steward in his affidavit, made in answer to the present rule, stated that the proof offered by *Errington* was not, in his opinion, conclusive; that it appeared by the court-rolls that *W. Ord* was not admitted as tenant for life merely, but pursuant to such limitations, and with such remainders over, as were contained in *Elizabeth Armstrong's* will (which was annexed to the affidavits in support of the rule), and that, at the time of the admittance of *Barbara* and *Elizabeth Poole* as after-mentioned, *W. Ord* was the last tenant of the premises

mises in question on the court-rolls of the manor. He also stated that *Errington* offered no evidence of his being the customary heir of *W. Ord*, the last tenant; that the deponent's only reasons, save as before set forth, for refusing to admit *Errington*, were, that, at the time of his application to be admitted, there was a surrender on the rolls to the use of *W. Ord's* will; that *Ord* had devised the premises as before-mentioned; and that *Barbara* and *Elizabeth Poole*, as his devisees, were, at the time of the said application, entitled, and by their attorney claimed, to be admitted according to the custom of the manor, in preference to the said *R. Errington*. He further stated that lands in the manor descended as in free and common socage, and that such lands were not devisable without surrender to the uses of the will (except for the benefit of certain near relations and of creditors), until the passing of stat. 55 G. 3. 1892.; and that, in the case of a regular devise by such will, the devisee was admitted.

Errington stated in his affidavit that the steward, at the above court of *June* 20th, on refusing to admit him, observed that he was in a condition to prosecute his claim at law without admission, which the devisees were bound to do, and, therefore, it was the steward's duty to admit him; but he said that he would direct the jury to find on their presentment, whether *Errington* had proved himself to be one of the heirs of *Elizabeth Armstrong*, or not. The jury afterwards found that *Errington* was proved to be her heir. The admittance of *Barbara* and *Elizabeth Poole* was postponed (in order that they might produce the probate of *William Ord's* will), and they were admitted, *October* 14th, 1835.

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Bayley now shewed cause. It cannot be contended, after the cases of *Rex v. The Masters, &c., of the Brewers' Company (a)*, and *Rex v. Wilson (b)*, that a party being the heir to copyhold premises may not have a mandamus granted to admit him. But here the party does not claim as the heir of the last tenant on the rolls; and it is questioned by the steward, whether he actually be the heir of the party under whom he claims. *William Ord* was the last tenant on the rolls; and it appears that he was not admitted in the mere character of a tenant for life. His devisees have been admitted; and the steward deposes that it was consistent with the custom of the manor to admit them, and not *Richard Errington*.

W. H. Watson, contra. Although the devisees of *Ord* have been admitted, *Errington* is entitled to be admitted also, because he claims as devisee of *Elizabeth Armstrong*, and cannot enforce or defend his right without admittance. It is true that he is her heir, and he has been so found by the homage; but he makes title as devisee, claiming under a tenant who has surrendered to the use of her will and has devised, ultimately, to her own right heirs. [Lord Denman C. J. Have you any clear authority for saying that the steward may admit two parties laying claim in different rights to the same copyhold?] It is necessary that he should, because the claimant, in a case like the present, cannot sue or defend without admittance. The admittance will not decide any thing conclusively: it will only give a prima facie right, and an opportunity to litigate the title. [*Bayley*. The rule is, that where a party may take as devisee or as heir, he takes as heir.]

(a) 3 B. & C. 172.

(b) 10 B. & C. 80.

Lord DENMAN C. J. This rule must be made absolute. I should have liked to see some case in which two claimants had been admitted under circumstances like the present; but I think it follows, from the nature of the thing, that the steward must have power to grant such admittance, because otherwise, by admitting one party, he must exclude the other.

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COLERIDGE J. (a) concurred.

Rule absolute.

(a) *Patterson and Williams Js.* had left the Court.

The KING *against* The Trustees of the
NORWICH and WATTON Road.

Wednesday,
November 9th.

AUSTIN had obtained a rule, in *Michaelmas* term 1835, calling upon the trustees acting in execution of stat. 3 & 4 W. 4. c. xv. (local and personal,

The trustees of a turnpike road, under a local act, claiming to take certain premises on paying com-

pensation to the parties interested, served a notice on a party, containing an offer of a sum in compensation for his undivided third part in a term in the premises, with a warning that, in default of his acceptance, a jury would be summoned to assess compensation. They afterwards served him with a second notice, directed to him and several other parties interested in the premises, that, in pursuance of the local act and stat. 3 G. 4. c. 126., a jury would be sworn to assess the sums to be paid to the parties for their respective interests. Notices similar to the first were served on the other parties named in the second notice. The jury were summoned, and sworn to assess the sums to be paid to the parties for their respective estates, but found only the gross value of the premises; and the inquisition stated that the jury found that sum to be the value to be paid to the parties for their estates, according to their respective proportions therein," without apportioning it. It appeared by affidavit that some of the parties were bare trustees.

1. Held, that the inquisition might be brought up by certiorari, being a proceeding under the local act and stat. 3 G. 4. c. 126. s. 85.; sect. 145. of that act, which takes away certiorari, being repealed by stat. 4 G. 4. c. 95. s. 86.; and stat. 4 G. 4. c. 95. s. 87. taking away certiorari in cases only of proceedings under st. 4 G. 4. c. 95.

2. That the inquisition was bad for not apportioning the value among the parties interested.

3. That the objection to the inquisition might be taken before any order was made to pay the money; and the Court ordered it to be brought up by certiorari, though no order had been made.

4. The inquisition did not set out that the several parties had been served with notices in treat, but the fact appeared by affidavit. Semble, that for this defect also the inquisition was bad, as not shewing a foundation for the jurisdiction.

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public), "for more effectually repairing the road from the city of *Norwich* to the windmill in the town of *Watton* in the county of *Norfolk*, and for making a new branch of road to communicate therewith," and of stat. 3 G. 4. c. 126. (turnpike road amendment act), to shew cause why a certiorari should not issue to remove an inquisition taken before three of the said trustees and a jury impanelled by the city of *Norwich*, to inquire into and assess (compensation in respect of certain premises, as after mentioned); and also the several notices given by or on behalf of the said trustees of their intention to take, pull down, and remove the said premises, and of the satisfaction and recompence offered by them for the same; and all things touching the said inquisition.

By sect. 8 of stat. 3 & 4 W. 4. c. xv., the trustees are empowered to make a new line of road, and to take, pull down, or remove, and take and use, any dwelling-houses, &c., set forth in the schedule annexed to the act, on making satisfaction for the same to the owners and other persons interested therein, or for the damage which such owners or persons may sustain. The premises mentioned in the rule were set forth in the schedule; where, under the column headed "Absolute owners," the description was, "Corporation of the City of *Norwich*;" and, under the column headed "Reputed owners," the description was, "*Elizabeth Strickland and Sarah Rogerson*, as joint lessees of the Corporation of the City of *Norwich*."

By the affidavits in support of the rule it appeared that a third part of a term in the premises, held under the Mayor, Sheriffs, City, and Commonalty of the city of *Norwich*, had been, by indenture of 14th December 1832, assigned to *Blyth, Wiseman,* and *Gridley*, upon certain trusts,

ists, and that *T. W. Rogerson* had become (since the death of *Sarah Rogerson*) the party beneficially interested under the indenture.

On the 12th of *August* 1835, a notice was left at *Rogerson's* house, directed to him solely, signed by three trustees and the clerk to the trustees, and dated the 12th of *July* 1835, stating that, at a meeting of the trustees, they had determined to take, pull down, and remove, for the purposes of stat. 3 & 4 *W. 4. c. xv.*, all that plasterer's shop, &c. (the premises in the rule), situate &c., late in the occupation &c., and set forth in the schedule, &c., and had ordered and agreed that 40*l.* should be offered to him, "as the satisfaction and recompence to be made to you for all that *the one equal divided third part or share* of and in the said shops," &c., "for the residue now to come and unexpired of a certain term of eighty years therein, and which said term was granted and created by an indenture bearing date on or about the 20th of *June* 1785, and made or expressed to be made between the Mayor, Sheriffs, Citizens, and Commonalty of the city of *Norwich* of the one part," &c.: "and the said trustees do hereby offer you the sum of 40*l.* as the value of, or in recompence and satisfaction for, *the part or share, term, estate, right, interest, and property* aforesaid." The notice then required *Rogerson* to shew his title "to the said *part or share* for the now residue of the said term of eighty years," in case he accepted the offer; and gave notice that if, for thirty days after the delivery thereof, he neglected or refused to treat, or did not agree, or was prevented from treating by absence, the trustees "will use the value, satisfaction, and recompence, to be

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given to you for *the part or share*, term, estate, right, interest, and property aforesaid, to be inquired into and assessed by a jury, pursuant to the statute in such case " &c.

On the 18th of *October* 1835, a notice was left at *Rogerson's* house, directed to *Elizabeth Strickland, Rogerson, Blyth, Wiseman, and Gridley*, signed by three trustees and the clerk to the trustees, dated 19th of *October* 1835, stating that the undersigned three trustees under stat. 3 & 4 *W. 4. c. xv.*, present at a meeting of the trustees, "give each and every of you" notice that, in pursuance of the said act, and of stat. 3 *G. 4. c. 126.*, or one of them, a jury will be sworn at a place and time therein named, "to inquire into, ascertain, and assess the sum or sums of money to be paid" by the trustees "to you the above named *Elizabeth Strickland and Thomas William Rogerson, Henry Ethelridge Blyth, Thomas Thurlow Wiseman, and Henry Gridley*, or some or one of you respectively, as the value, recompence, and satisfaction, of and for *your respective estates, rights, interest, and property*, of and in all that " &c. (describing the premises), required and intended to be taken and pulled down and removed by the trustees, pursuant to the first mentioned act; "and also to inquire into and ascertain and assess the sum and sums of money to be paid by the trustees acting" &c. "*to any other person or persons*, having any estate, term, or interest in the premises, as the value, recompence, and satisfaction of and for his, her, and their respective term, estate, and interest therein:" the notice then required the parties addressed, "and each and every of you," to appear before the jury, and produce all deeds, &c., relating to the premises.

Rogerson

Rogerson deposed that he had received no other notice, and that *Blyth*, *Wiseman*, and *Gridley* had no beneficial interest in the premises.

Three trustees signed a warrant, addressed to the sheriffs of the city of *Norwich*, professing to be in pursuance of the two acts, and commanding them to impanel a jury, to inquire into, ascertain, and assess the sums to be paid by the trustees to *Elizabeth Strickland*, *Rogerson*, *Blyth*, *Wiseman* and *Gridley*, "or some or one of them respectively, as the value, recompence, and satisfaction, of and for their respective estates" &c., and any other person, &c., as in the notice last mentioned.

The jury met, and were sworn, by the under-sheriff, to inquire into, ascertain, and assess the sum or sums of money to be paid by the trustees to *Elizabeth Strickland*, *Rogerson*, *Blyth*, *Wiseman*, and *Gridley*, some or one of them respectively, as the value, &c., of and for their respective estates, &c. Having heard the evidence, and viewed the premises, they stated that they found the value of the land to be 85*l*.: on which the person, who attended on behalf of *Mrs. Strickland*, inquired whether that sum was given as the value of *Mrs. Strickland's* interest; to which the foreman answered, that they considered 85*l*. to be the value of the whole. The jury were then asked, whether they included the interest of the corporation of *Norwich*; to which the foreman replied, that they did not. They were then asked, whether they found that 85*l*. was the whole value of the interest of the lessees in the whole land to be apportioned between *E. Strickland* and *Rogerson*; to which the jury assented. No question was put as to the expenses which would be occasioned by repairing the fences on the side of the adjoining road. The follow-

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ing inquisition was signed and sealed by three trustees and the twelve jurymen.

“ An inquisition taken at ” &c. “ this 5th day of *November*,” “ by virtue of the precept,” &c. (of the three trustees who signed), “ being three of the trustees appointed by, or by virtue, and acting in execution of, an act ” &c. (3 & 4 *W. 4. c. xv.*), “ and in and by a certain other act ” &c. (3 *G. 4. c. 126.*), “ before the said ” &c. (three trustees); “ upon the oaths of ” &c. (the twelve jurymen), “ twelve indifferent ” &c., “ who, being duly summoned, and returned and sworn to inquire into, and ascertain and assess the sum or sums of money to be paid by the trustees acting ” &c., to *Elizabeth Strickland*, of &c., *Thomas William Rogerson*, of &c., *Henry Etheridge Blyth*, of &c., *Thomas Thurlow Wiseman*, of &c., and *Henry Gridley*, of &c., “ or some or one of them respectively, as the value, recompense, and satisfaction of and for their respective estates, rights, interests, and property, of and in all that ” &c. (describing the premises), all which &c. “ are required and intended to be taken,” &c., “ by the said trustees, pursuant to the powers and for the purposes of the said first mentioned act, and also to inquire into and ascertain and assess the sum or sums of money to be paid by the said trustees acting in execution of the said first mentioned act, to any other person or persons having any estate, term, or interest in the premises, as the value, recompense, and satisfaction for his, her, or their respective term, estate, or interest therein, and also to do and determine all such other matters and things relating to the premises as could or might be lawfully done or determined under or by virtue of the said acts of parliament, or either of them, upon their oaths find, after
view

view had and evidence heard, that the sum of 85*l.* is the value, recompense, and satisfaction, to be paid to the said " &c. (naming the five parties), " of and for their states, rights, interests, and property, of and in the said " &c., " according to their respective proportions herein. In witness " &c.

By the affidavit of the clerk to the trustees, in opposition to the rule, it appeared that *Elizabeth Strickland* was entitled to two third parts of the term, of which *Rogerson* was beneficially interested in one third part; and that notices, similar to the first notice served on *Rogerson* (except as to names), had been severally served on *Elizabeth Strickland*, *Blyth*, *Wiseman*, and *Gridley*; that no evidence was given before the jury of any damage sustained by the lessees; that the jury was summoned for the purpose of fixing the value of the estate and interest of the parties entitled as leaseholders, and not of the remainder in fee, the corporation having made an arrangement with the trustees for their estate and interest, and having subscribed towards the road; that no order had been made for the payment of the sum found by the jury.

Kelly and *Palmer* now shewed cause. First, no certiorari is grantable. By sect. 145 of stat. 3 G. 4. c. 126., " no proceeding to be had or taken in pursuance of this act, shall be quashed or vacated for want of form, or removed by certiorari, or any other writ or process whatsoever, into any of his Majesty's Courts of Record at *Westminster*." The same section, in the earlier part, gives an appeal to the next quarter sessions (except as is there mentioned), to any person who shall think himself aggrieved by any thing done in pursuance

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suance of this act. It is true that sect. 86 of stat. 4 G. 4. c. 95. repeals both that appeal clause of the former act, and the clause taking away the certiorari. But sect. 87 of stat. 4 G. 4. c. 95. re-enacts the appeal clause, and extends it to any person thinking himself "aggrieved by any order, judgment, or determination made, or by any matter or thing done by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road in pursuance of this act, or the said recited act, or any local act for making, repairing or maintaining any turnpike road (except where the order, judgment or determination of any such justice" &c. "are hereby declared to be final and conclusive," &c. with other exceptions not material); and, by the same section, "no proceeding to be had or taken in pursuance of this act shall be quashed," &c., "or removed by certiorari," precisely as in the former act. The parties, therefore, might have appealed; and, consequently, the certiorari cannot go. [*Cole-ridge J.* By stat. 3 G. 4. c. 126. s. 85., the inquisition is final and conclusive; does not that bring the case within the exception in stat. 4 G. 4. c. 95. s. 87.?] That seems to mean final and conclusive as to amount, not as to form. But if it mean final and conclusive for all purposes, those words of themselves take away the certiorari. Besides, the exception extends only to orders, &c., "hereby declared to be final and conclusive;" that is, so declared by stat. 4 G. 4. c. 95. Now it is the former statute only which declares the inquisition to be final and conclusive. [*Patteson J.* The certiorari is taken away, by stat. 4 G. 4. c. 95. s. 87., in cases only of proceedings "in pursuance of this act." The inquisition is taken, not under this later act, but under

under the local act, and stat. 3 G. 4. c. 126. s. 85.] So far as stat. 3 G. 4. c. 126. is not repealed by stat. 4 G. 4. c. 95., it is recognised by it, and the two may be considered as incorporated; so that what is done under the former is done also under the sanction of the latter (a). But, further, the certiorari is manifestly intended to be taken away, by the later act, in all cases where the appeal is given; now, the appeal is expressly given in the case of any matter or thing done in pursuance of either act, or any local act.

Secondly, supposing the certiorari not to be taken away, it will be objected that the inquisition does not set out the notice to treat. There is no enactment requiring this. It is, no doubt, a general rule that, where an act is done by an inferior jurisdiction, the proceedings, on their face, should shew every thing necessary to the authority. But, here, the inquisition is merely interlocutory; the trustees (by st. 3 G. 4. c. 126. s. 85.) are afterwards to order the payment of the money; and that is the essential and operative part of the proceeding. The words of st. 3 G. 4. c. 126. s. 85. are, "such verdict or inquisition and judgment, *order and determination thereon*, shall be final, binding, and conclusive" &c. The order may, hereafter, if it be necessary in point of form, set out the notice. The affidavits shew that in fact the notice has been given; a fact which did not appear in *Rex v. Bagshaw* (b).

(a) By stat. 4 G. 4. c. 95. s. 88., all the powers, &c., matters and things whatsoever, contained in stat. 3 G. 4. c. 126., so far as "not expressly altered or repealed by this act," shall be in force with respect to this act, as fully as if repeated in the body thereof; "and the said recited act and this act shall, as to all matters and things whatsoever (except as aforesaid), be considered as one act."

(b) 7 T. R. 363.

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Thirdly, the application is premature. The inquisition effects nothing till the order be made: then, if at all, the proceedings are to be removed; but the Court will not grant a certiorari to remove interlocutory proceedings at every step. In *Rex v. Bagshaw (a)* a certiorari was granted, because no notice (in compliance with certain local acts) appeared to have been given: but there the trustees had made the order in pursuance of the inquisition; and the certiorari removed the whole proceedings.

Fourthly, it will be objected that the inquisition does not apportion the compensation among the different parties. As between the lessees and the trustees, the only question was the value of the property, and nothing else was discussed; and the jury have found the value. They had no means of deciding upon the respective interests of the parties claiming under the indenture of 1832; neither was such an enquiry within their jurisdiction. The reversioners, the corporation of *Norwich*, have given up their claim to compensation, on account of the advantage derived by the city from the road.

B. Andrews, and *Austin*, contra. First, the certiorari is not taken away. Sect. 145 of st. 3 G. 4. c. 126. is repealed by st. 4 G. 4. c. 95. s. 86. The only question then is, whether the enactment as to the certiorari in sect. 87 of the latter statute be applicable here. But that enactment is expressly confined to proceedings in pursuance of that act: this proceeding is in pursuance of the former act and of the local act. It is said, however, that the appeal to the quarter sessions is preserved by

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the earlier part of st. 4 G. 4. c. 95. s. 87.; and that the certiorari is intended to be taken away whenever there is such an appeal. But there is no appeal; for the last-cited section excepts from appeal cases where the order, &c., are final and conclusive, which the proceedings under sect. 85 of st. 3 G. 4. c. 126. are declared to be. [*Patteson J.* But the exception in st. 4 G. 4. c. 95. s. 87. is only where the order, &c., are "declared to be final."] Independently of this express exception, the verdict, &c., being declared final in st. 3 G. 4. c. 126. s. 85., are, by those words, protected from appeal under both statutes. Again, the clause in st. 4 G. 4. c. 95. s. 87., taking away the certiorari, being expressly confined to proceedings under that act, can operate here only on the supposition that the directions in st. 3 G. 4. c. 126. s. 85. are incorporated in st. 4 G. 4. c. 95.; and, on that supposition, the proceedings became final within the latter act, and therefore are within the exception in the appeal clause of that act. Again, the appeal is given in cases only of orders, judgments, or determinations by justices, trustees, or commissioners: this is a finding by a jury. Where an appeal is given to the sessions, that Court decides summarily, and awards costs: but they cannot have been intended to do so on a question of the value of premises; especially as the costs here, by st. 3 G. 4. c. 126. s. 87., are to be paid by the trustees or the owners, according as the sum assessed *by the jury* (without any provision as to the sessions) shall exceed, or not, the offer made by the trustees. The sessions could give only the costs of the appeal.

Secondly, the inquisition must shew that the proceeding is warranted, which is not done here. On this point,

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point, *Rex v. Bagshaw* (a) is conclusive. In that case the inquisition was quashed, not merely the order. So in *Rex v. Wilson* (b), where an inquisition following a defective conviction for forcible entry was defended on the ground that it might be taken as a proceeding by itself, the Court said that, if so taken, it was bad for not shewing on what authority it was founded. Yet there the inquisition was only preparatory to a writ of restitution. Further, since the costs depend on the sum found by the inquisition, the inquisition should shew to what parties notice to treat was given, in order that it may appear who becomes liable. So in *Rex v. Mayor &c. of Liverpool* (c) an inquisition was quashed for not shewing the notice, which was the foundation of the jurisdiction. [Coleridge J. Had they gone on to the order there?] There was a judgment, which was brought up, and quashed, together with the inquisition and verdict; but Lord Mansfield said that the notice "ought to have appeared upon the inquisition." In *Rex v. Sheppard* (d) an order for stopping up a highway, under st. 55 G. 3. c. 68. s. 2., was quashed, because it did not shew, on its face, that it was made at a special session. The form in *Burn's Justice* recites the notice to treat (e).

Thirdly, it is said that this application is premature, the inquisition being inoperative without the order to pay. But the inquisition is the judgment. The order must follow the inquisition, and is, in fact, merely the obedience of the trustees to the award in the inquisition.

(a) 7 T. R. 363.

(b) 3 A. & E. 817, 837.

(c) 4 Burr. 2244.

(d) 3 B. & Ald. 414.

(e) See 3 *Burn's J.* p. 296. (28th edit., by Chitty); *Highways, Turnpike*, s. xxi. Forms, No. 76.

It is an order on their own officer, or on themselves. At the utmost, it is a mere minute. It does not appear that it must necessarily be in writing. The words of st. 3 G. 4. c. 126. s. 85. are "verdict or inquisition and judgment, order and determination thereon," where "verdict," "inquisition," and "judgment" are synonymous, as "order" and "determination" are. If the inquisition were, as suggested, merely an interlocutory proceeding, it might, supposing it bad, be neglected as invalid, and another inquisition might be taken: but that will not be contended for; it is clearly final till quashed. The applicants are aggrieved by the inquisition, as a party is by a rate, though it has not been put in force.

Fourthly, the inquisition is not final. First, no compensation is made to the reversioners. Secondly, the compensation is not apportioned among the lessees, though a notice was given to each. The affidavits shew the several interests; and the jury were sworn to assess the sum to be paid to each lessee, respectively, for the respective estate of each, and to any other person having interest: yet they merely award a gross sum to be paid to the four lessees "according to their respective proportions." Separate offers were made to each: some may thus become liable to pay the costs upon the inquisition, others to receive. In some events, under sections 87 and 141 of st. 3 G. 4. c. 126., the costs are to be levied by distress; but how is the warrant to be framed, if the respective liabilities be not apparent on the inquisition? Thirdly, the damages incidental to the future repair of the fences of the premises, on each side of the road, should be found; *Rex*

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v. *The Commissioners of Llandilo Roads* (a); but, here, only a satisfaction for the property taken is awarded.

LORD DENMAN C. J. The first objection is that the inquisition does not contain such a notice as is requisite to give a jurisdiction under the act. Into that question I need not enter fully. *Rex v. Bagshaw* (b) shews that on all the proceedings sufficient must appear to give validity. Whether the inquisition be, as is contended, merely interlocutory, so that this formal defect in it may be ultimately supplied, I will not consider; for, even if that be so, there still is a conclusive objection. Here are several parties having several interests, and a jury is impannelled to assess the value of, and recompence and satisfaction for, their respective interests. But they find only one general sum. How can the order apply this sum, so as to give effect to the act? That, therefore, is a decisive objection. Then the question is, whether we can entertain this objection, or whether the certiorari is taken away. By sec. 87 of st. 4 G. 4. c. 95., "no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by certiorari." But how is the inquisition a proceeding had in pursuance of st. 4 G. 4. c. 95.? It is said to be so, inasmuch as the act recognises st. 3 G. 4. c. 126, under which the proceedings are had, and that thus the earlier act, so far as it is not repealed, is incorporated in the later, and what is done under the earlier may be understood to take place under the sanction of the later. But each act has a distinct operation on various points; and, to bring the proceeding within st. 4 G. 4. c. 95.

(a) 2 T. R. 232.

(b) 7 T. R. 363.

87., it must be a proceeding expressly pointed out that act, and not merely taken under another act recognised by it. But, even supposing st. 3 G. 4. c. 126. be made part of st. 4 G. 4. c. 95., the 145th section of the former act gives the appeal only where a party thinks himself aggrieved by any thing done by a justice. And the appeal clause of sect. 87 of st. 4 G. 4. c. 95. applies only to things done by justices, or trustees or commissioners. Now this is an act done by a jury; and it therefore is not the subject of appeal. At any rate, the later act, if it adopt the provision of the former, does not at the same time enlarge it so as to take away the restriction. The inquisition, therefore, being faulty in its essential part, in which the order, if ever made, must follow the inquisition, cannot be allowed to stand.

PATTESON J. As to the question, whether the certiorari be taken away, stat. 4 G. 4. c. 95. s. 87. is not applicable to this proceeding, which, as conceded, is under stat. 3 G. 4. c. 126., and neither entirely nor partially under stat. 4 G. 4. c. 95.; and the clause as to the certiorari, in sect. 87 of stat. 4 G. 4. c. 95., is expressly confined to proceedings "had or taken in pursuance of this act." Thus far the plain words of the legislature. But then it is said, that this 87th section of stat. 4 G. 4. c. 95. gives an appeal against things done "in pursuance of this act, or the said recited act, or any local act" for turnpike roads, and that the certiorari must be taken away co-extensively with the grant of the right of appeal. If the legislature meant this, they have not said it. In the first place they speak merely of "this act," in the next, of "the said recited act," and "any local act" also. They must therefore mean different things in the

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two places. And Mr. *Andrews* argued conclusively that, if the words “in pursuance of this act,” in the clause taking away the certiorari, were applied to the recited act, and local act, by way of incorporation, then “hereby,” in the clause of exception as to the right of appeal, would have an equally extensive meaning, so that the appeal would not be given. No doubt the exception is absurdly worded ; but I think the most reasonable construction is, to confine the clause taking away the certiorari to proceedings under stat. 4 G. 4. c. 95. : and then this proceeding, being under stat. 3 G. 4. c. 126., is not within the clause, and the certiorari is not taken away. Then it is said that the inquisition, even if bad, is still not a final proceeding, and that therefore the application is premature. Certainly stat. 3 G. 4. c. 126. s. 85. says, “after the said jury shall have inquired of and assessed such damage and recompence, they the said trustees or commissioners shall thereupon order the sum or sums of money so assessed by the said jury, to be paid to the said owners or other persons interested, according to the verdict or inquisition of such jury ; and such verdict or inquisition and judgment, order and determination thereon, shall be final, binding and conclusive.” Then the question is, whether, by the way in which the words are here coupled, the whole is made a single proceeding, and the order is necessary to complete the proceeding before we can deal with the inquisition at all. I think that is not so. The trustees have no discretion: they are directed to make an order for the payment of the sum found by the jury. The making the order is merely ministerial ; it is not a judgment, nor in the nature of a judgment. The inquisition therefore is binding. Now several objections are made to it. It does not apportion the compensation,

though

though the parties have separate interests, and have had separate notices served upon them. The finding a gross sum creates a fatal objection. Whether the notice ought to appear on the inquisition is a point on which I desire not to be concluded: but my impression is, that it should appear, not as the finding of the jury, but in the nature of a caption.

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WILLIAMS J. The only difficulty I had was in determining whether this application be premature, that is, whether any further step be necessary to make the proceedings complete. No case was cited in which a certiorari had been granted before the proceedings were complete. But, supposing the order made, it could not depart from the inquisition. Making the order is therefore purely a ministerial act; and no opportunity would be afforded for amending the inquisition. Therefore, I think we are to consider the inquisition; and I have no doubt it is defective for the reason given. It strikes me, too, that the foundation of the order should appear on the face of the inquisition. I know no exception to that rule. Here, if the proper preliminary steps had not been taken, the jury had no rightful office. On the other point, I shall only add that the assessment of the compensation in one gross sum creates a conclusive objection. As to the question whether the certiorari be taken away, it cannot be so except by clear words; and that is not the case here.

COLERIDGE J. As to the first question, and I think the most important one, whether the certiorari be taken away, I always thought express words necessary to give an appeal to an inferior Court, and to take away a cer-

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tiorari. *Rex v. Terret* (a) furnishes an instance. The proceeding now in question is clearly under stat. 3 G. 4. c. 126. By sect. 145 of that act, the certiorari is taken away; and that section is repealed by stat. 4 G. 4. c. 95. s. 86. Then, is the certiorari again taken away by sect. 87 of stat. 4 G. 4. c. 95.? That clause takes it away only in the case of proceedings "in pursuance of this act." A great deal of discussion has been gone into on the question, whether there be a right of appeal to the sessions. If there be, it is a powerful argument in favour of the *probability* of the certiorari being taken away; but it is not conclusive. There may be an appeal, and yet a certiorari; or there may be no appeal, and no certiorari. Then, the certiorari not being taken away, can the objections to the inquisition be taken at this stage? Without laying down a general rule, we may say that, whenever there has occurred a defect such as can never be remedied, the party interested may object as soon as the irremediable step is taken. Whenever a party interested in the regularity of these proceedings sees that he cannot get his compensation from the trustees, he may come forward with the objection. Thus the main question is, must not this defect, if it exist, continue to the end of the proceedings? It clearly must: if the compensation be not properly awarded by the inquisition, it never can be properly awarded. The next question then is, whether the inquisition be defective or not. Now, when we see for what the jury was impanelled, and that serious questions may arise respecting costs and other matters, as to which it does not appear what is to be done, we cannot fail to perceive that the proceeding is defective. Suppose, instead of the

(a) 2 T. R. 735.

ties being entitled, as those who received this notice, to separate shares of the same estate, some of them were reversioners, the form of impannelling the jury would be the same; yet, according to the argument against the rule, a jury might award a gross sum, and leave all the parties interested to settle amongst themselves how it was to be divided. The defect is, therefore, a substantial one, and incapable of being remedied; and the applicants are entitled to relief at this stage.

B. Andrews then suggested that the notices ought to be brought up, as well as the inquisition.

Per Curiam. The rule must be for bringing up the inquisition.

Rule absolute accordingly.

The King against The Trustees of the Wrexham, Ruthin, and Denbigh Turnpike Roads.

*Thursday,
November 10th.*

On last *Hilary* term, *J. Jervis* obtained a rule nisi for a mandamus calling upon the commissioners under several acts of parliament for repairing and amending the roads from *Wrexham* to *Denbigh*, &c. (a), to restore *Edward Jones* to the office of clerk to the said commissioners. *Jones* had been appointed clerk by a resolution which requires certain notices to be given when it is intended to revoke any order of the commissioners.

And, therefore, where commissioners had discharged a clerk by a resolution made without such notices, a mandamus was granted to restore him. Although, at a former meeting, the commissioners had ordered proper notices to be given of a meeting for the purpose of discharge, and the notice had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself.

(a) 32 G. 2. c. 55., 30 G. 3. c. 97., 41 G. 3. c. 93. (local and personal, public), 3 G. 4. c. xliii. (local and personal, public).

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Sect 43. of the general turnpike act, 4 G. 4. c. 95., empowering commissioners of turnpike roads to remove their clerks, &c., must be taken in conjunction with sect. 39,

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of the commissioners at a meeting held *April 21st 1819*. At a meeting of the commissioners, *May 5th 1835*, it was ordered that the clerk and treasurer should bring in all their accounts and demands on the trust on the 8th of *August* then next, and that due notice (a) of a meeting on that day should be given, for the purpose of rescinding the appointments of clerk and treasurer, and of electing others in their stead. By the default (as the commissioners alleged) of *Jones*, no notice of such meeting was ever given, nor was the meeting of *May 5th* adjourned to *August 8th*. On the 6th of *July 1835*, some of the commissioners met and passed a resolution that *Jones* should be continued in office for the ensuing year (b). That meeting was adjourned to *August 3d*, when a further adjournment was made, to *October 5th*. In consequence of the adjournment to *August 3d*, as *Jones* alleged, no notice was given of a meeting on *August 8th*. On the 8th of *August* several of the commissioners, who were not acquainted with the proceedings subsequent to *May 5th*, met, in consequence of the order then made; but, learning what had been done since, they took no further step. On the 2d of *November 1835*, another meeting was held, and it was then ordered that *Jones* should be

(a) By the general turnpike act, 4 G. 4. c. 95. s. 39. "no order or determination at any meeting of the said trustees or commissioners, once made, agreed upon or entered into shall be revoked or altered at any subsequent meeting, unless notice of the intention to make such revocation or alteration shall have been given" by three or more trustees or commissioners, in writing, to their clerk, at a previous meeting, and entered in the book of proceedings of such meeting, and published as by this section is directed; "nor unless such revocation or alteration shall be agreed to be made by a greater number of trustees or commissioners than concurred in the making of any such order or determination."

(b) All the names signed to the resolutions of this meeting were different from those subscribed to the resolution of *May 5th*.

discharged.

discharged. No notice had ever been given of the intention to make such order.

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Alexander now shewed cause. First, if it was an irregularity that *Jones* should have been dismissed at a meeting the purpose of which had not been announced, this was occasioned by the misconduct of *Jones* himself, and he cannot now allege it against the order of the commissioners. [Lord *Denman* C. J. If they had held their meeting on the 8th of *August*, and discharged *Jones*, or given notice of a further meeting for that purpose, and he had then contended that the proceedings were irregular, the present argument might have had weight; but nothing was done on that day.] Secondly, turnpike commissioners may discharge a clerk without any notice of a meeting for the purpose. Sect. 43 of stat. 4 G. 4. c. 95. gives a general power to appoint and remove clerks, without restriction as to notice; and this clause is wholly independent of s. 39.

Sir *J. Campbell*, Attorney-General (with whom was *Jervis*), contra, was stopped by the Court.

LORD DENMAN C. J. We think that the commissioners might have held their meeting on the 8th of *August*; and, at all events, have given notice of a future meeting for the purpose of dismissing their clerk. And it is correct that such notice should be given before the officer is removed.

PATTESON and WILLIAMS Js. concurred.

COLERIDGE J. It is clear that sects. 39 and 43 of stat. 4 G. 4. c. 95. must be taken together.

Rule absolute.

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Thursday,
November 10th.

The KING *against* The Minister and Church-
wardens of STOKE DAMEREL.

Quære,
whether a quo
warranto lies
for the office of
sexton?

Semble, per
Lord Denman
C. J., that, if
the right of
electing a sex-
ton be in the
inhabitants of a
parish, and a
mandamus to
hold a meeting
for such elec-
tion be grant-
able, the writ
may be pro-
perly directed
to the church-
wardens, and
not to the in-
habitants in
general.

Where a re-
quisition had
been directed
to the church-
wardens to call
a meeting for
such election,
which they de-
clined to do,
on the ground
that the mi-
nister had re-
fused his con-
sent, alleging
the right of
election to be
in himself;

semble, per
Lord Denman C. J., on motion for a mandamus to hold such election, that the demand and refusal were sufficient to warrant an application for a mandamus to the minister and churchwardens.

A mandamus was moved for as above, on affidavits making a *prima facie* case of right in the inhabitants to elect, but affidavits were filed in answer stating facts to shew that the right was in the rector: Held, that a mandamus ought not to go, the evidence not being decisive in favour of the applicants, and there being another mode of trying the right, viz. by withholding the sexton's fees, or by submitting to the payment and bringing an action against him for the amount.

ERLE, in last *Hilary* term, obtained a rule nisi for a mandamus calling upon the minister and churchwardens of *Stoke Damerel*, in the county of *Devon*, to convene a vestry meeting within that parish, for the purpose of electing a proper person to fill the office of sexton of the said parish.

The office, which is profitable and for life, became vacant, about *October* 1835, by the death of *John Garland*, the last sexton, who had held it fifty years. On his decease, *John Symons* was appointed sexton by the senior curate, who claimed to make such appointment, as minister, the rector being absent, the living under sequestration, and curates having been nominated by the bishop. The appointment was afterwards confirmed by the rector. Certain parishioners, being of opinion that the right of electing a sexton was, by ancient usage, in the rate payers of the parish, sent a requisition to the churchwardens, in *January* 1836, after the appointment of *Symons*, calling upon them to convene a vestry meeting for the purpose of electing a sexton. The churchwardens submitted the requisition to the senior curate, who stated the right to be in the minister, in the absence of any legal custom to the contrary, and there-

fore

re refused to allow a vestry to be called in the church for the proposed election. The churchwardens, consequently, declined to comply with the requisition, alleging the above refusal as a reason. The affidavits in support of the rule stated, as a matter of notoriety, that the right of election was in the parishoners; several persons deposed, from their own recollection, that *Garland* had been chosen by the parishoners, and not by the rector; and similar statements were made, upon hearsay, as to one *Weston*, *Garland's* predecessor. Affidavits were filed in opposition to the rule, contradicting the above statements as to the right, and alleging that both *Garland* and *Weston* had been elected by the rector and not by the parishoners. It was also stated that the parish books from 1740 to 1800, in which vestry meetings were entered, made no mention of any meeting for the election of a sexton, or of any appointment to that office, although, during that period, there had been four elections of sextons, not including the last. Subjoined to the last-mentioned affidavits was a notice from the rector, dated in *October 1835*, mentioning *Garland's* death, asserting the rector's sole right to appoint a sexton, and warning all persons not to interfere with it; and it appeared that this notice, as well as the refusal of the senior curate, had been communicated to the parties making the requisition, when the churchwardens declined to call a meeting.

Sir *W. W. Follett*, with whom was *Crowder*, now withdrew cause. In the first place, the office is full, and therefore a mandamus cannot be the proper course. [Lord *Denman* C. J. Is this an office for which a quod warrantum would lie?] The claim to it is treated by the applicants

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applicants as a matter of public concern. If this were a corporate office, there could be no doubt that, the office being full, a quo warranto, and not a mandamus, would be the proper remedy. [Lord Denman C. J. In that case, if the office were full by an appointment clearly made without any authority whatever, a mandamus might go; though, generally, the plenarty would be an objection to the proceeding by mandamus.] *Rex v. The Mayor of Colchester (a)* shews the rule adopted on that subject. A mandamus is not necessary here. A parishioner may try the validity of the appointment by refusing to pay the fees. And, further, this application is for a mandamus to the minister and churchwardens to call a vestry for the purpose of an election; the requisition being made in the first instance to the churchwardens. No precedent has been found of the granting of such an application. In an *Anonymous* case in *Strange (b)*, a mandamus was moved for, to the churchwardens of *St. Botolph, Bishopsgate*, commanding them to call a vestry in *Easter* week for the election of churchwardens; "but the Court refused it, saying, there was no instance of such a mandamus, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed." In *Rex v. The Churchwardens of St. Peter's Thetford (c)*, a motion was made for a mandamus calling upon churchwardens to make a rate for repairs of a parish church; but this application also was refused, the Court saying that the matter was of ecclesiastical jurisdiction. [Coleridge J. Who do you say has the power of convening the vestry here?] Sir, *John Nicholl*, in *Dawe v. Williams (d)*, says that "vestries,

(a) 2 T. R. 259.

(b) 2 Str. 686.

(c) 5 T. R. 364.

(d) 2 Add. Ecc. Rep. 139.

for

For church matters, regularly are to be called 'by the churchwardens with the consent of the minister.'" But, in fact, there is nothing here to shew who would be proper persons to convene a vestry for the purpose then contemplated. [*Patteson J.* referred to *Rex v. Vir (a)*.] In that case the mandamus (to elect churchwardens) went to the inhabitants generally. No application has been made here to the minister of the parish, nor have the churchwardens been called upon to act in concurrence with him. The only requisition has been to the churchwardens apart. [*Lord Denman C. J.* Is not it sufficient if the churchwardens have refused, and the parties applying have learnt from them that the minister will not consent?] The meeting, perhaps, could not be regularly held without the minister's consent; but it is not shewn that such meeting ought to be called by the minister and churchwardens, as proposed.

The office has been filled by the rector; and no person has proved that the right of appointment is in any one else.

Erle and *Wightman*, contra, were then called upon to support the rule; the Court intimating that they felt no doubt of there having been a sufficient refusal to ground the application.

As to the right of electing, the affidavits on the other side have not proved that it is in the minister. [*Lord Denman C. J.* It lies on you to prove that it is in the parishioners.] The statements in support of the rule prove this sufficiently. (They then went into the matter of the affidavits.) There being, then,

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a fair ground laid for this application, it should be shewn on the other side that there is some other mode of trying the question than by mandamus. *Rex v. Ramsden (a)*, and the authorities collected in 2 *Selw. N. P. Quo Warranto* I, II. (b), prove that a quo warranto information would not lie. As to the suggested course of refusing the fees, it will be in the power of the officer to delay that remedy by forbearing to demand them of the adverse parties till the witnesses who speak to transactions of very remote date are all dead. A mandamus has been issued to churchwardens to restore a sexton, *Ile's Case (c)*; there is no difference in principle between such a mandamus and a mandamus to call a meeting for the purpose of electing. The Court will of itself take notice who are the proper parties to convene the meeting; and *Dawe v. Williams (d)* and *Rex v. The Churchwardens of St. Margaret and St. John (e)* shew that, in this respect, the present application is not erroneous.

LORD DENMAN C. J. Some difficulties have been raised in this case, which are now removed. I think that there have been a sufficient demand and refusal to justify this application; and that, where the parishioners, or a considerable portion of them, wish a vestry to be called, it is reasonable that a mandamus, if grantable, should be directed to the churchwardens, and not to the inhabitants in general. Then, is this a case in which a mandamus ought to go? With respect to the custom alleged in support of the rule, that the parishioners

(a) 3 A. & E. 456.

(c) 1 Vent. 153.

(e) 4 M. & S. 250.

(b) Pp. 1166, 1170. 9th ed.

(d) 2 Add. Ecc. Rep. 130.

should

could elect, there is some evidence, though not strong, that at the last election such a custom was acted upon. But, on this occasion, the office is full by appointment of that person who, in the ordinary course, would have the power of appointing. The inhabitants who make the present application think the proceeding void. I own that, unless there were a very strong case to shew that it was so, and unless there were no other remedy, I think a mandamus ought not to go. In my opinion there is another remedy. Any person may dispute the right to the office by refusing to pay the fees, or by bringing an action against the officer if he takes them. We cannot look at any supposed consideration which may render it politic for him to forego his fees; nor can we assume that he will hold the office without regard to the emoluments. I think therefore that a mandamus ought not to be granted, inasmuch as there is another remedy, and as we ought not to sanction a supposed custom interfering with rights usually enjoyed, unless we had more cogent evidence than that now before us.

PATTESON J. I am of the same opinion. I cannot at present find any reported case in which a mandamus has been granted to elect, where the office was already filled by a void election; but I am sure, from my recollection, that the practice is so, if the Court is satisfied of the election being void (a). In *Rex v. The Corporation of Bedford* (b), where the corporation had elected a Mayor who would not attend to be sworn in, because

(a) It seems to have been so understood, in *Rex v. The Churchwardens of St. Pancras*, 1 A. & E. 80.; and see there the judgments of Parke J., p. 100., and of Patteson J., p. 102.

(b) 1 East, 79.

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said Courts from further proceeding in the suit between the parties.

The suit, in the Consistory Court, was promoted by *Robert Hart* against the Rev. *G. W. Marsh*, the rector of a parish in the diocese of *Hereford*, of which *Hart* was a parishioner and churchwarden. In the introduction to the articles, the articles, charges, interrogatories, &c., were stated to be "touching and concerning the lawful correction and reformation of your manners and excesses, and more especially for incontinence, profane swearing and cursing," &c., stating the general charges which are set out in the articles following, but without particulars of the offences. The contents of the articles, so far as it is material to extract them, were as follows : —

1. That by the ecclesiastical laws, customs, and constitutions of the church of *England*, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment and behaviour in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, lewdness, assaultings, quarrellings, fightings, profligacy, or any other excess whatsoever, and from being guilty of any indecency themselves, or encouraging the same in others; and, furthermore, they are enjoined and required to abstain from resorting to any taverns or alehouses, and not to give themselves to any base or servile labour, nor to drinking or riot; not to be absent from their benefices without supplying curates that are sufficient and licensed preachers; and, also, are enjoined and required to visit the sick, and to instruct and comfort them in their distress, and not to forsake their calling and use themselves in the
course

course of their lives as laymen; but that, on the contrary, they are enjoined at all convenient times to hear or read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, bearing in mind that they ought to excel all others in purity of life, and to be examples to other people, *under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censure as the exigency of the case and the law thereupon may require and authorize*, according to the nature and quality of their offences.

2. That the defendant was in holy orders, and rector of the parish, in the diocese.

4. That the defendant was guilty of incontinence, with a person named in the article, and at times and places specified: and circumstances in corroboration were stated.

6. That the defendant had addicted himself to excessive drinking, and had frequented alehouses for the purpose of drinking, had been guilty of profane cursing and swearing, of quarrelling and fighting, had assaulted and sworn at many of his parishioners, and had made use of much profane language and many oaths.

7. That, at a time and place specified, the defendant was much intoxicated, and then insulted, assaulted and struck R. G., challenged him to fight, and cursed and swore at him. 8, 9, 10, 11. Charges of drunkenness, frequenting alehouses, swearing, fighting, challenging to fight, &c., the times, places, and circumstances being specified.

13. That "in the years 1819, 1820, and 1821, or in three, two, or one, of such years, you carried on the

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trade and business of a maltster, in" &c., "*and that you thereby wilfully gave yourself up to base and servile labour ;*" &c.

14. That, at the same time, "you also carried on the trade or business of a flannel manufacturer, at" &c. ; "*and that you also bought and sold wool for profit and gain, and thereby exercised yourself in the course of your life as a layman ;*" &c.

15. That, at the same time, "and for several years previous thereto, you unlawfully occupied a large farm, consisting of 200 acres and upwards, and tilled and cultivated the lands and grounds thereof, without any leave or permission from the Bishop of *Hereford* for the time being, or any other lawful authority ; and that, during the time mentioned in the two next preceding articles, you continued to cultivate the said farm, and to carry on the said two several trades or businesses at one and the same period of time ; and you were in the habit of attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares, and merchandize, in your respective businesses, trades, or characters, of husbandman, maltster, wool dealer, and flannel manufacturer ; thereby forsaking and neglecting your sacred duties of a priest or minister, *and using yourself in the course of your life as a layman ;*" &c.

16. That, "in or about the year 1823, you were arrested and placed in prison ; and that you remained there for the space of about six years ; and that, by reason of your carrying on the several trades in the first, second, and third last preceding articles, or one of them, mentioned and stated, and of your having exercised yourself in the course of your life as a layman,
and

and of your having forsaken and neglected your sacred duties of a priest or minister, you were found and declared to be a dealer and chapman, and to have committed an act of bankruptcy, by the commissioners named in a certain commission of bankruptcy," &c. The article further stated that, by reason of such imprisonment and bankruptcy, great inconvenience and injury had been experienced by several of the parishioners, and particularly by the promoter in this cause, *Robert Hart*, and *M. H.*, and *R. H.*; and that, by reason of *Marsh's* unlawfully exercising the trades aforesaid, he was the less able to attend his spiritual and ministerial duties, and greatly neglected the same, &c.

17. Charged omissions to do duty, and absence from his benefice without leave, and without providing a sufficient curate.

18, and 19. Charged him with applying the churchyard to improper and indecent purposes; and, on some occasions, during divine service.

20. Stated that, by reason of the immorality of the defendant's conduct in the preceding articles, he had given great offence to the parishioners, and the congregation had diminished.

21. "That for your said incontinence, profane cursing and swearing, indecent conversation, drunkenness, rioting, and immorality, for your lewd and profligate life and conversation, for the profane usage of the churchyard, for resorting to taverns and alehouses to drink and indulge yourself in loose and idle conversation, for the total omission and neglect of divine service on divers *Sundays* and *Christmas* days, for absenting yourself from your benefice without leave of your ordinary for the time being for that purpose first had and

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obtained, and without supplying your benefice with a curate that was a sufficient and licensed preacher, for neglecting to visit the sick, for your giving yourself up to base and servile labour, and forsaking the sacred calling of a minister, and using yourself in the course of your life as a layman, and depasturing cattle and turning out swine into the churchyard," &c., "and for your other vices, immoralities, and excesses, you ought to be canonically punished and corrected," &c.

22. That, by stat. 5 & 6 *Ed. 6. c. 4.*, it was enacted (a) "that, if any person whatsoever, shall at any time after the 1st day of *May* next coming, by words only, quarrel, chide or brawl in any church or churchyard, that then it shall and may be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient," &c.

23. That, at specified times and places, the defendant had taken a part in riot and fighting, and encouraged fights between persons named.

24, 25. That he had cursed, sworn, brawled, &c. in the churchyard, (stating particulars as to time, person, &c.) and that he had thereby incurred the penalty of stat. 5 & 6 *Ed. 6. c. 4.*

28. That all the premises were true, public, &c.; of which legal proof being made to us the Judges aforesaid, and to this Court, we will that you be not only duly corrected, according to the force &c. of the statute hereinbefore mentioned, and the exigency of the

(a) Sect. 1.

law, but also that you be duly and canonically punished and corrected according to the exigency &c.; and also be condemned in the costs, &c.

These articles were admitted by the consent of the defendant, and entered as admitted with such consent.

The introductory part of the sentence set out that the vicar-general and official principal had heard, &c., a certain cause, &c., against the Rev. *G. W. Marsh*, clerk, rector &c., for incontinence, for profane cursing and swearing, &c. (setting out the offences charged, in general terms, but not specifying the circumstances), and for neglect of his ministerial duty, as well by his carrying on of divers trades and businesses at one and the same time for a long period together, as also for unlawfully carrying on and exercising the trades or businesses of a dealer in corn, and buying and selling the same for profit, of a maltster, of a wool dealer, and also of a flannel manufacturer, and for farming and cultivating a farm consisting &c., without any leave, &c., and for his attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares, and merchandise, as otherwise, and for relinquishing and forsaking the sacred calling of a minister, *and using himself in the course of his life as a layman*, &c.; as in the articles given and admitted in this cause are exhibited, &c. The adjudication proceeded as follows. "Forasmuch as the heads, positions, articles, charges," &c., "we have found, and it doth evidently appear to us are, *for the most part sufficiently and in truth fully proved and founded*, we," &c., "pronounce, decree, and declare, that the said articles," &c., "*are for the most part sufficiently and fully proved and substantiated*: and that the Rev

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G. W. Marsh, clerk, rector of" &c., "be suspended for the space of three years, to commence" &c., "from discharging all functions of his clerical office, and the execution thereof; viz. from preaching," &c., "in the said parish church and elsewhere within the diocese of *Hereford*, and from all profits," &c. The defendant was also condemned in the costs, &c.

The defendant appealed to the Arches Court of *Canterbury*.

Maule and *Cleasby* now shewed cause. After sentence, the Court will not interfere unless the Ecclesiastical Court has manifestly proceeded upon matters not within its cognizance; *Carslake v. Mapledoram* (a). Now here the object of the suit, as appears by the first article, and by the sentence, is solely deprivation under the canons. A court of common law cannot enter into the question of deprivation: therefore, it is immaterial whether or not any or all of the articles charge matters of which the ordinary courts of law take cognizance for the purposes of criminal jurisdiction (b); *Slater v. Smalebrooke* (c), *Townsend v. Thorpe* (d), *Free v. Burgoyne* (e). Further, as to several charges, such as that of incontinence, it will be allowed that the Ecclesiastical Court has exclusive jurisdiction: and, therefore, even if that Court could proceed only on these, yet, as the sentence is not professedly grounded on all, this Court after sentence will presume that those charges only were proceeded

(a) 2 T. R. 473.

(b) See *Searle's Case*, and *Searle v. Williams*, *Hob.* 121. 388. (5th ed.).
S. C. Cro. Jac. 430.

(c) 1 Sid. 217.

(d) 2 Ld. Raym. 1507.

(e) 5 B. & C. 400. *S. C.* on appeal, 2 Bligh, N. S. 65.

on which are within the jurisdiction. Objections will be made to the articles charging the defendant with trading. It is true that, by stat. 21 *H. 8. c. 13. s. 5.*, penalties are imposed on spiritual persons for trading in corn or any manner of victual or merchandise: that enactment was repealed by stat. 57 *G. 3. c. 99. s. 1.*, which act, however, by sect. 3, imposes a penalty on any beneficed spiritual person, who shall "engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandise, by buying and selling," &c. But these statutes do not inflict deprivation; and, therefore, they cannot be construed to take away the jurisdiction of the canon law as to that. Indeed sect. 83 of the last-mentioned statute enacts that nothing in the act contained shall affect the jurisdiction belonging to any Archbishop or Bishop, by virtue of any statute, canon, usage, or otherwise. Now there is a canonical prohibition, that ecclesiastical persons "shall not give themselves to any base or servile labour" (*a*). And the conclusion of the thirteenth article is, "that you thereby wilfully gave yourself up to base and servile labour." The preceding part of the article is merely a description of the particular act which brings the rector within the canon. So the fourteenth article concludes, "and thereby exercised yourself in the course of your life as a layman." Now, by canon, "no man being admitted a deacon or minister, shall" "use himself in the course of his life, as a layman" (*b*). The fifteenth article concludes like the fourteenth. So the sixteenth concludes with a charge of inability to attend spiritual and ministerial duties, and

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(*a*) 1 *Gibson's Codex*, 162. tit. vii. ch. 3. (canons, 1603. lxxv.).

(*b*) 1 *Gibson's Codex*, 163. tit. vii. ch. 3. (canons, 1603. lxxvi.).

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gross neglect of the same. The gist of each article is an offence rendering the rector liable to deprivation by the spiritual Court. [Lord Denman C. J. They are so framed: but they state the act by which the offence is supposed to be committed; so that "thereby," and what follows, might be struck out.] Whether a particular act be, or be not, an offence within the canon, is peculiarly a question for the Ecclesiastical Court. The first article is in fact a transcript from different canons: and the twenty-first article enumerates the offences in general terms, not specifying the particular act. "If the spiritual Court do proceed wholly on their own canons, they shall not be at all controuled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a person is aggrieved, his proper remedy is not by prohibition, but by appeal." 3 Burn. Ecc. L. Prohibition, 2. (p. 219. 8th ed.). If any objection be taken to the form of the sentence (which, however, is the usual one), that is matter of practice, and can be discussed only in the spiritual Court (a) upon appeal. Further, it appears, by affidavit, that the defendant has consented to the articles, and an inquiry has been had on the merits: therefore, he cannot now object to them.

R. V. Richards, contra. The application for prohibition is never too late, if it be *pro defectu jurisdictionis*; *Offley v. Whitehall* (b), *Leman v. Goulty* (c). Now the

(a) See *Ex parte Smyth*, 3 A. & E. 724.

(b) *Burnb.* 17.

(c) 3 T. R. 3.

sentence refers generally to all the charges. Some of these are not of ecclesiastical cognizance, but of that of the common law. Thus the exercise of the trades specified is prohibited by statute, as admitted on the other side. So challenging to fight, as in the ninth article, is an indictable offence. It is said that the object of this proceeding is merely deprivation; but the Ecclesiastical Courts are not warranted in drawing to themselves cognizance of a matter cognizable by the common law, merely by affixing to it the penalty of deprivation. It is admitted that they cannot try the bounds of a parish: could they obtain cognizance of such a question by charging a beneficed clergyman, who should contest it, with thereby violating some canon, and so subject him to deprivation, and then insist that they are to judge whether it be a violation of the canon or not? Then, if there be want of jurisdiction as to any of the charges, the sentence, which leaves it uncertain on which charges it proceeds, is bad; and no jurisdiction certainly appears.

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Lord DENMAN C. J. Supposing some of the charges to be insufficient, as those of trading as a maltster, and as a flannel manufacturer, still there are several other charges; and the Ecclesiastical Court finds them for the most part proved. To get rid of the sentence of that Court, it is necessary to shew that it has adjudged on matters which are in the proper jurisdiction of the courts of common law. That we cannot find in the present case. It is clear that the Ecclesiastical Court had jurisdiction over some of the matters charged: only it is said that there are also some as to which objections might be taken to the jurisdiction. It is quite consistent with

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with the sentence that the Ecclesiastical Court may have acquitted on these. To set aside the proceedings after sentence, it should be shewn that the Court has clearly exercised a jurisdiction which it did not possess; and that is certainly not made out.

PATTESON J. It is laid down by several authorities, and not denied now, that, after sentence, unless the want of jurisdiction be manifest, this Court will not interfere. Supposing some of these articles to be founded on charges not within the cognizance of the Ecclesiastical Court, that might have been shewn before sentence. By the sentence, the onus is shifted; and the party objecting has to shew that the Ecclesiastical Court proceeded on the objectionable articles. There is no affidavit to that effect; so that the matter rests in uncertainty.

COLERIDGE J. concurred (a).

Rule discharged with costs.

(a) *Williams J. was absent.*

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The KING *against* The Churchwardens of the
Parish of ST. MICHAEL'S, PEMBROKE.

Thursday,
November 10th,

AT a vestry of the parish of *St. Michael, Pembroke*, held 15th *July* 1830, the churchwardens were authorised to raise and borrow a sum not exceeding 1000*l.* for enlarging and improving the parish church, to be repaid with interest at such times, and in such manner, and by such instalments, as should be settled by the churchwardens, and to be charged on the church-rates. The requisite consents were given. *Ann Morgan* advanced 1000*l.* to the churchwardens, receiving as security an indenture, dated 20th *September* 1830, under the hands and seals of the then churchwardens, the said churchwardens being parties thereto of the first part, and *Ann Morgan* of the second part. The indenture recited stat. 59 G. 3. c. 134. s. 40 (a); that the patron, ordinary, and incumbent had consented

Churchwardens, under stat. 59 G. 3. c. 134. s. 40., borrowed 1000*l.* from *M.*, upon the credit of the church rates, agreeing with *M.* that the sum should not be called in for twenty years, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by the rates, or otherwise; and that, in the meantime, *M.*

should receive interest at 5 per cent. Some years after the agreement, and before the expiration of the twenty years, interest being in arrear, and no instalments of principal having been paid, nor any money raised to provide for liquidating the principal, this Court, on the application of *M.*, granted a mandamus, calling on the churchwardens to raise by rates a sum for the payment of the interest due, and to pay the same to *M.*; and also to raise by rate a sum equal to the amount of the yearly interest of the 1000*l.*, to be computed from the time of the borrowing, for providing a fund to pay the 1000*l.* But the Court refused to order any payment to be made to *M.* by way of instalment on the 1000*l.*

(a) Which enacts, "that when any parish shall be desirous of extending and increasing the accommodation in the parish church, and it shall be found necessary or expedient to that end to take down the existing church and to rebuild the same on the same site, or on a more convenient site, it shall and may be lawful for the churchwardens of any such parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the consent also of the ordinary, patron, incumbent and lay impropriator, if any such there be, to take down such existing church, and to rebuild the same upon the same or upon a new

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consented in writing to the alteration, and that there had been no dissent by persons authorised to dissent; "and whereas the said *Ann Morgan* has agreed to advance the sum of 1000*l.* on the credit of the said rates, and it has been agreed that the said sum shall not be called in and paid off before the expiration of twenty years from the day of the date of these presents, unless the said churchwardens shall be desirous of paying off the same at any time before, or as soon as a sufficient sum shall be raised by means of the said rates or otherwise, and that in the mean time she the said *Ann Morgan* shall receive interest for the said sum of 1000*l.* after the rate of five per cent. per annum:" it was then witnessed that, in consideration of the sum of 1000*l.* then acknowledged to be advanced by *A. M.*, the churchwardens charged and made liable the church rates with the repayment of the principal with interest at five per cent., to be paid every 20th of *September*, "in the mean time, and until the said principal sum shall be repaid;" and assigned the rates so charged to *A. M.*, her executors, &c.; habendum, "from the day of the date thereof until the said sum of 1000*l.* and the interest thereof at the rate aforesaid, shall be fully paid and satisfied:" "with

new site; and the said churchwardens are hereby authorised and empowered to borrow and raise, upon the credit of the church rates, or any rates made under the said recited act or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of the taking down and rebuilding such church, and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund, of not less than the amount of the interest of the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money."

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such powers of raising and collecting for the purpose as the churchwardens possess by act of parliament." On the 16th of *January* 1836, there was due to *Ann Morgan* interest from the 20th of *September* 1834; and she had received no instalments of the principal. She had often applied to the churchwardens to raise by the church rates sufficient money for payment of the interest, and for the yearly and gradual liquidation of the principal, or to raise a fund for the ultimate liquidation of it; but no rate for any of these purposes had been made. On affidavit of these facts by *Ann Morgan*, a rule was obtained in *Hilary* term last, calling on the churchwardens to shew cause why a mandamus should not issue, commanding them to pay to *A. M.* the instalments of the 1000*l.* which had become due, and also the arrears of interest due thereon, or to raise by rate a sufficient sum to pay, as well the instalments, as the arrears of interest, and to pay the sum so raised to *Ann Morgan*.

The affidavits in answer stated that part of the interest claimed was satisfied.

Maule now shewed cause. No instalments of the principal are payable. By the agreement, the sum is not to be paid for twenty years from the date of the indenture, unless the churchwardens choose, before, or as soon as a sufficient sum is raised, to pay it off. Sect. 40 of stat. 59 G. 3. c. 134. fixes no time for the repayment, but leaves that to the agreement of the parties. It is true that the churchwardens are authorised and empowered to make rates for paying the interest, and for providing a fund of not less than the amount of the interest, for repaying the principal, or for repaying the principal in such manner as the parties shall

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shall agree. That cannot make it compulsory on them to pay the money, or any part of it, to the lender, who has agreed not to call it in for twenty years. But, if the fund so raised is not to be immediately applied to the repayment of the lender, neither can it be meant that, in a case like this, the churchwardens, besides paying the annual interest, shall be bound to lay by a sum equal to the interest annually. If 50*l.* were raised and laid by every year till the twenty years expired, this, accumulating with merely simple interest, would, at the end of the time, exceed the principal debt by the amount of the whole interest upon the annual reservations. The word “annual” is not used in the section.

Sir *W. W. Follett* contra. An annual reservation of a sum equal to the interest will exactly satisfy the debt at the end of the twenty years; and it was probably with a view to this that the parties fixed that period for the final liquidation of the debt. The object of the statute was to distribute the burden of repayment equally over a certain period; and, if the lender had waited till the period had expired, her application for a rate to repay the whole would have been answered by the argument that she ought to have taken care that the funds were raised from time to time, according to the statute. The sum therefore ought to be raised now, and paid: if the lender be debarred from claiming this, by the agreement, she has at least a right to insist that it shall be laid by for her final repayment. But, in fact, the agreement seems merely framed with the view of allowing the parish the full benefit of the statute (which directs that a sum not *less* than the interest shall
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be raised), as to time: so that now the lender can claim no larger instalment of the principal than a sum equal to the interest, whereas, if there were no specification as to time, she might claim the whole whenever she chose.

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LORD DENMAN C. J. There is no doubt that this rule must go to compel the payment of the interest due. I think also that it must go to compel the raising a sum not less than the interest. The word "annual" is not, indeed, in the section referred to; but it must be supplied, otherwise no sense can be given to the enactment. The lender claims also to have the sum so raised paid to her: I think she is not entitled to that; she can have only the interest which is due; the payment of principal, till the twenty years expire, is, I think, optional with the churchwardens, under the agreement. It is necessary to give to the statute the beneficial effect which it was intended to have, namely, that of making the parish raise portions of the principal from year to year, without any violent change in the amount of taxation. The mandamus, therefore, must go, to raise the interest now due, and also to raise a sum equal to the aggregate of the interest of the years elapsed.

PATTESON and COLERIDGE (a) Js. concurred.

Maule then suggested that, if a sum were raised, not less than the interest, in every year henceforward, without including the years elapsed, the sums so raised, with

(a) *Williams J.* had left the Court.

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interest upon them at less than 5 per cent., would make up the whole principal before the twenty years would expire.

Lord DENMAN C. J. We cannot tell what may occur in the meanwhile.

Ordered, that a writ of mandamus issue directed to the churchwardens of &c., commanding them to raise by rate, to be made for that purpose, a sufficient sum of money for payment of the interest now due upon the principal sum of 1000*l.* borrowed by the churchwardens of the said parish from *Anne Morgan* upon the credit of the church rates of the said parish, under the provisions of the statute (59 G. 3. c. 134.) and of the several other acts subsequently passed in furtherance of the same object; and to pay over the same to the said *Anne Morgan*: and also commanding the said churchwardens to raise by rate, to be made for that purpose, a sum equal to the amount of the yearly interest upon the said principal sum of 1000*l.*, to be computed from the time of the borrowing of the same, for providing a fund for the repayment of the said principal sum of 1000*l.*

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 November 11th.

Ex parte ———, Gent., One, &c.

This case is reported, 4 *A. & E.* 576., note (a).

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The KING *against* CHITTY.*Friday,*
November 11th.

AT the election of councillors for the borough of *Shaftesbury*, in *December* 1835 (pursuant to stat. 5 & 6 *W. 4. c. 76. ss. 30, 140.*, and his Majesty's order in council, of 11th *September* 1835), *Philip Matthew Chitty* was declared to be duly elected a councillor, and made and subscribed the declarations required by sect. 50, and thereby accepted the office. In *Hilary* term last, a rule nisi was obtained for an information in the nature of a quo warranto, calling on him to shew by what authority he claimed to be councillor. The affidavit in support of the rule stated that *Chitty* still continued to hold the office, and that, at the time of election and still, he was an uncertificated bankrupt. The affidavits in answer stated, that he was entered on the burgess roll for the year in respect of a house, was rated to the poor for a house in *Shaftesbury*, of the annual value of 36*l.*, and had been an inhabitant householder there, for that and the two preceding years, and had, before the last day of *August* 1835, paid all rates payable by him in respect of his house, except such as became payable within six calendar months of that day; that there was no borough-rate payable by him under the act, in respect of the premises, before 1st *March* 1835, and that *Shaftesbury* was not divided into wards (*ss. 9, 22, 28.*).

An uncertificated bankrupt is not disqualified from being elected a councillor for a borough, and holding the office, under stat. 5 & 6 *W. 4. c. 76.*, unless he became bankrupt while holding.

Erle and *Bingham* now shewed cause. The defendant is and was duly qualified, unless he be disqualified by

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having been an uncertificated bankrupt at the time of his election. Now sect. 28 enumerates all the disqualifications, and does not specify this. It is true that sect. 52 provides that, if a person holding the office of councillor be declared bankrupt, he shall thereupon immediately become disqualified, and “cease to hold the office:” but that provision does not apply to persons who are bankrupts at the time of their election. The intention of the legislature, in making this distinction, was probably to give the electors an opportunity of determining whether the fact of a party becoming bankrupt made him, in their opinion, unfit for the office of councillor; whereas, in the case of a party elected after his bankruptcy, the determination would have been already manifested. This is analogous to the vacating of seats in the House of Commons, by the acceptance of certain offices, the holders of which are nevertheless capable of being elected. It is simply an exercise of discretion given to the electors upon the occurrence of a new fact. Sect. 51 subjects parties elected to a fine if they do not accept, with certain exemptions, which do not include bankruptcy. Sect. 53 imposes a penalty upon a party acting without being duly qualified at the time of making the declaration, “or after he shall cease to be qualified according to the provisions of this act, or after he shall become disqualified to hold any such office.” This recognises the distinction between the qualification to be elected, and a disqualification subsequently occurring. Upon any other view, “ceasing to be qualified” would comprehend both cases.

Sir *J. Campbell*, Attorney-General, *contra*. The intention of the legislature clearly was to prevent uncertificated

licated bankrupts from being councillors at all. If it had been merely intended to give the electors an opportunity of exercising their choice upon knowledge of a fresh fact, the legislature would have allowed the bankrupt to be re-elected immediately, as in the case of members of the House of Commons accepting offices; whereas he cannot, by sect. 52, be re-elected till he has obtained his certificate. So, by the same section, if a councillor take the benefit of any act for the relief of insolvent debtors, or compound with his creditors, he cannot be re-elected till he has paid his debts in full. Independently of the disqualification by sect. 52, the bankrupt is disqualified under sect. 28. The disqualification, in respect of property, is the not either possessing real or personal estates, or both, to a certain amount, or being rated to the poor upon a certain annual value: but an uncertificated bankrupt can have neither real nor personal property, nor can he be owner of rateable premises. This is probably the reason why sect. 52, in terms, provides only that an uncertificated bankrupt shall cease to hold office, and not be re-elected till he obtain his certificate; the assumption being that the election of a party so disqualified is impossible under sect. 28. The Court, however, is not now called upon to give a binding decision on the subject, but to grant the rule, so that the question may be discussed on a return.

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Lord DENMAN C. J. I agree that the question ought to be solemnly considered, if it be one of any doubt. But I think the Court would clearly not be justified in raising any inference of an intention to disqualify, where such an intention is not expressed. We are bound by what is said. The act has said what shall be a qualification,

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and what a disqualification. It has been ingeniously put that the qualification of being rated can be applied only to a party who is capable of owning property; and that no rateable property can belong to an uncertificated bankrupt. It is enough for us to abide by the words of the act. The party here is rated upon the annual value required, and is not disqualified. There may perhaps be strength in the argument drawn from sect. 52, that, inasmuch as a party becoming bankrupt is not re-eligible till he has obtained his certificate, nor an insolvent or party compounding with his creditors till he has paid in full, the electors were intended not to have any power of electing persons so situated. But, if that were so, it might have been declared in the twenty-eighth section; and it is not declared.

PATTESON J. I am entirely of the same opinion. The Attorney-General argues that an uncertificated bankrupt is not rateable, and is, therefore, disqualified under sect. 28, because he cannot be the owner of rateable property. I do not see that this follows. It would equally follow that he could not be a burgess under sect. 9. But, under sect. 11, every occupier may claim to be rated: there is no provision that he must be entitled to the premises. Suppose the assignees do not elect to take a term, and the bankrupt does not deliver up, the bankrupt will still be rated. Therefore, without going into minute criticism of the words of sect. 52, I am of opinion that the disqualification to be elected is confined to the cases mentioned in sect. 28, and does not comprehend the present case.

WILLIAMS J. concurred.

COLERIDGE

COLERIDGE J. I am of the same opinion. We are not at liberty to intend a disqualification, where the clauses of the act specify what is to be a disqualification.

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Rule discharged.

The KING against ANDREW WHITE.

Friday,
November 8th.

A RULE was obtained in *Hilary* term last, calling upon *Andrew White* to shew cause why a *quo warranto* information should not be exhibited against him, to shew by what authority he claimed to be mayor of the borough of *Sunderland*, in the county of *Durham*, on the grounds, first, that *George Stephenson*, who made out the lists, was not the town clerk of the said borough, nor a person performing duties similar to those of town clerk (a): Secondly, that the election of councillors of the said borough was held before *Richard Spoor*, who was not mayor or chief officer of the said borough.

The Court will grant a *quo warranto* information, at the instance of a private re-lator, against a member of a corporation, on grounds affecting his individual title, although it be suggested that the same objections apply to the title of every member, and therefore that the application is, in effect, against the whole corporate body.

The affidavits in support of the rule stated that *Stephenson* had acted as town clerk, in receiving and distributing the burgess lists, previously to the election of councillors in *December*, 1835; that on that election *Spoor* acted as chief officer of the borough; that the councillors then elected chose aldermen on the following 31st of *December*; that the said councillors and aldermen, and among them the said *Spoor*, did, on *January* 1st 1836, elect *Andrew White*, one of the above mentioned councillors, mayor for the year ensuing; and that he had since acted as mayor; that, at the time of the passing of the Municipal Corporation Act, 5 & 6 W. 4.

(a) Stat. 5 & 6 W. 4. c. 76. ss. 15, 16.

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c. 76., there was no body corporate within the town of *Sunderland*, for the regulation or governing of the town or any part thereof; nor was there any reputation of the existence of any such corporation; nor was there any mayor or other person having or claiming, or reputed to have, any authority or power in the municipal regulation or government of the town; and that there was at no time any person filling, or reputed to fill the office of town clerk therein, or whose duties in the borough were similar to those of town clerk; that charters were granted to the town in the twelfth century, and in 1634, but that (as the deponents believed) no municipal officers were elected under the latter, and that, at all events, for a hundred years past, there had been no municipal officers in the town, nor any municipal corporation, in fact or by reputation; that the only office filled by *Stephenson* was that of clerk to the county magistrates acting as justices in the town; and that *Spoor*, before the said election of councillors, never filled, or pretended to fill, any office for the municipal or public or other regulation or government of the town; that there was in the town a body assuming to be a body in the nature of a private corporation, under the style and name of the freemen and stallingers of *Sunderland*, of whom *Spoor* was one; but that they never interfered, nor was it their corporate duty to interfere, in the rule or government of the town, nor did they exercise or claim any corporate or other powers over the inhabitants; and reference was made to the proceedings on an application for a quo warranto against them in 1829 (see *Rex v. Ogden (a)*), in the course of which *Spoor* had made affidavit that they never

(a) 10 B. & C. 230.

interfered, &c. (as above), nor claimed to exercise any corporate or other powers within the town, except over their own members, and with regard to their own affairs.

Affidavits were filed in opposition to the rule, stating that the freemen and stallingers of the Borough of *Sunderland* were an ancient corporation, having possessions on the town moor, &c., and consisting of twelve superior, and eighteen inferior, freemen; that, before the passing of the Municipal Corporation Act, and before the proceedings brought in question by this rule, there had been no officers bearing the names of mayor or town clerk, but that "the senior freeman for the time being of the said town" had acted as the chief officer of the corporation of stallingers; that *Spoor*, as the senior freeman of the said corporation (willing to officiate), had been called upon by the burgesses to act as chief officer of the borough at the first election of mayor, aldermen, and councillors: and that *Stephenson*, for thirteen years past, had been solicitor to the corporation, of stallingers, and had on various occasions, as such solicitor and with reference generally to the affairs of the town, performed duties similar to those of a town clerk.

Sir *J. Campbell*, Attorney-General, and *Wightman*, now shewed cause. The objection now taken would affect the title of every member of the corporation. It is, in effect, that no valid corporation exists in *Sunderland*. Now it was decided, in *Rex v. The Corporation of Carmarthen* (a), that a private relator cannot bring a quo warranto information against a corporation as such: and in *Rex v. Ogden* (b), where such an information was applied for against the corporation of stallingers mentioned in the

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(a) 2 Burr. 869. S. C. 1 W. Bl. 187.

(b) 10 B. & C. 250.

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present affidavits, Lord *Tenterden* said (referring to the *Carmarthen Case* (a)) that, "if any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation, as a body, to shew by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General." And *Rex v. Ogden* (b) shews that a motion against individuals which is virtually a motion against the corporation falls under the same rule. If the statute 5 & 6 W. 4. c. 76. had never passed, and corporate officers had been elected for *Sunderland*, the Court would not have allowed a private relator to bring quo warranto on the ground that the charters had never before been acted upon, and that no corporation existed. The statute makes no difference in this respect. The complainant here does not point out any person who could have discharged the functions exercised by *Spoor* and *Stephenson*. According to him, if judgment of ouster went against *White*, there could be no re-election. But the statute 9 Ann. c. 20. s. 4., empowering private relators to proceed in quo warranto, applies only to cases where there is a corporation admitted to exist, which may, after the judgment of the Court, be restored to its proper state by a regular election. Other cases are for the Attorney-General. Then, upon the merits of this election, the affidavits in opposition to the rule furnish a complete answer; or, if the objection on behalf of the relator is, in itself, entitled to attention, it is met by the interpretation clause, 5 & 6 W. 4. c. 76. s. 142. (They also referred to the mention of *Sunderland* in schedule (A) of the statute. The further arguments on this part of the case are omitted.)

(a) 2 Burr. 869. & C. 1 W. Bl. 187.

(b) 10 B. & C. 230.

Sir

Sir *W. W. Follett* contra. First, there is no ground for assuming that this application affects the whole corporation of *Sunderland*; the "mayor, aldermen, and commonalty of the borough of *Sunderland*" being one of the bodies recognised by stat. 5 & 6 *W. 4. c. 76. s. 1.* and sched. A., and to which continuance is given by sect. 6. It would seem, therefore, that the Attorney-General could not now call in question the existence of a corporation in *Sunderland*, and consequently that the claim of any individual to be mayor, alderman, or councillor, under the circumstances now presented to the Court, may properly be contested by a private relator. It is not, however, to be conceded that such a relator might not prosecute a quo warranto against any member of this corporation, even though the result of a successful prosecution might be to dissolve the whole body. In *Rex v. The Corporation of Carmarthen* (a) the motion was made, in terms, against the whole corporation; and it was said that there was no instance of a quo warranto information being brought "against any corporation as a corporation:" but motions were afterwards made against the individual members respectively, and rules granted. And it is well known that, in practice, quo warranto informations are often applied for where the prosecution will not lead to any new election, and even where the success of it will destroy the corporation: though the Court, where that is so, will require a strong case to be made for granting the application. In *Rex v. Ogden* (b) the persons against whom the motion was made did not exercise or claim any public powers or authorities; and the application was against a number

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(a) : *Burr.* 869. *S. C. 1 W. Bl.* 187.(b) 10 *B. & C.* 230.

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of individuals for acting as a corporation; the assumption of which franchise (as Lord *Tenterden* pointed out) can be called in question only by the Attorney-General. In both respects that case differed from the present. (He was then stopped by the Court.)

LORD DENMAN C. J. I think that *Rex v. Ogden* (a) has been satisfactorily distinguished from the present case. There is great good sense in the rule there laid down; but the question directly brought before the Court was, whether a private relator could file a quo warranto information against parties for acting as a body corporate. In *Rex v. The Corporation of Carmarthen* (b) an attempt was made by a private relator to raise such a question, and the Court held that it could not be done; but they allowed an information to go against the members individually. Then, upon the facts in this case, I think there is doubt enough to make a further consideration of it proper. The rule will therefore be absolute.

PATTESON J. In *Rex v. Ogden* (a) the information would have called upon the parties to shew why they acted as a corporation at all: and, besides, they did not claim to exercise any powers of government or municipal authority over the other inhabitants of the town. That case therefore entirely differs from this. Then is it any answer here, that every member of the corporation may be in the same predicament with the party moved against? I think there is no instance in which the Court has so held, where the objection applied to the party individually.

(a) 10 B. & C. 230.

(b) 2 Burr. 869. S. C. 1 W. BL 187.

WILLIAMS J. There have been many instances in which the Court has allowed a quo warranto information, where the consequence might have been the loss of an integral part of the corporation, and where, if that part were lost, the whole was lost.

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against
Warrs.

COLERIDGE J. concurred.

Rule absolute.

The KING *against* BARDELL and Others.

Friday,
November 11th.

THE defendants were indicted for a conspiracy to obstruct *George Shillibeer* and another in carrying on their business as owners of omnibuses. The indictment was removed into this Court by certiorari, and the case came on for trial, *May* 15th, 1834, when an order of Court was made (entitled, "The King on the prosecution of *George Shillibeer* and another, against *James Bardell* the younger and twelve others"), stating that, by consent of parties, the jurors were discharged from giving a verdict, subject to the award, order, &c., of *A. B. Esq.*, barrister at law, to whom all matters in difference between the prosecutor and the defendants, or any or either of them, were thereby referred, to order and determine what he should think fit to be done by the said parties respecting the matters in dispute, &c.; the costs of the prosecution and defence, and of the reference and award, to be in the arbitrator's discretion: and it was ordered that the Court might be prayed to make the order of reference a rule of this Court. After the lapse of a year and some months (during which proceedings were had among the parties

Stat. 3 & 4 W. 4. c. 42. s. 39., which takes away the power of revoking a submission to arbitration, does not extend to a reference, agreed to on the trial of an indictment; but, where such reference has been made at nisi prius, with a proviso for making the order a rule of Court, either party may, by himself or attorney, still revoke his submission.

The Court, however, will not, upon such revocation, make a rule to restrain the arbitrator from proceeding.

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The KING
against
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ties themselves for the purpose of arranging their disputes, but no final agreement was come to), a meeting took place before the arbitrator, and a notice was served upon him, subscribed by one of the defendants, and by persons signing as attorneys for the others, stating that the undersigned defendants and their attorneys thereby revoked the authority given to the arbitrator by the order of reference. The arbitrator, considering it doubtful whether he could go on with the reference or not, recommended an application to the Court; and, in *Hilary* term last, a rule was obtained calling upon the prosecutors and the arbitrator to shew cause why the arbitrator should not be restrained from further proceeding in the reference, on the ground that his authority had been revoked; or why the defendants should not be at liberty now to revoke his authority.

Bompas Serjt., and *Platt*, now shewed cause. The question is whether, this being a criminal prosecution, any of the parties had power, notwithstanding stat. 3 & 4 W. 4. c. 42. s. 39., to revoke their submission to arbitration. That section takes away the power to revoke without leave of the Court or a judge, where an arbitrator is appointed by rule of court, judge's order, or order of *nisi prius*, "in any action;" but it adds, "or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record." This order of reference contains such an agreement; for the clause which provides for making the order a rule of Court is (like all the other terms of the reference) consented to by the parties; and such a consent, in an order of this kind, is an agreement, under the sanction of
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the Court. Besides, even if the parties themselves could have revoked, persons claiming to act as their attorneys could not do it on their behalf, in a criminal prosecution.

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Sir John Campbell, Attorney-General, and Humfrey, contra. In the case of an indictment, parties have still the same power of revoking a submission to arbitration which they had at common law. Stat. 3 & 4 W. 4. c. 42. s. 39. contemplates two descriptions of cases: the one, where there are proceedings in court; the other, where the matter is referred out of court. If it had been intended, in the first class of cases, to include those arising upon indictment, express mention would have been made of them: but the language used is "in any action now brought or which shall be hereafter brought;" and the words which describe the remaining class evidently relate to submissions by bond or other private agreement. Here, the reference was made by order of nisi prius, but not in an action; and the case, therefore, falls within neither provision of the statute. [*Patteson J.* Is there any instance in which the Court has interfered to restrain an arbitrator from making an award, after revocation? The award may be a nullity when made; but that is a different point. *Platt.* Search has been made for precedents; but none has been found.]

Lord DENMAN C. J. I am clearly of opinion that this case of revocation is not within the statute. To take away the power of revocation which parties had at common law, the enactment ought to be very clear. The thirty-ninth section of stat. 3 & 4 W. 4. c. 42. applies
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to two distinct cases; first, where the parties consent to a rule of court, judge's order, or order of nisi prius, in any action; secondly, where there is a submission containing an agreement for making it a rule of court. This case does not fall within the first branch of the enactment; and the clause which has been relied upon does not constitute an agreement within the second. But, as to the rule before us, we cannot avoid disposing of it; and I think that it must be discharged.

PATTESON J. I have not the slightest doubt on this subject. The thirty-ninth section is evidently framed to apply to civil actions. The whole act is so. The words, "any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record," evidently point to stat. 9 & 10 *W. 3. c. 15.*, and the "submission" there spoken of. In 1 *Chitty's Statutes*, 33, it is said, in note (b) to stat. 9 & 10 *W. 3. c. 15.*, that "criminal offences which are personal, such as assault," &c., "for which an action of damages would lie, may, it is said, be submitted to arbitration;" "and if an indictment has been preferred in any such case the matter of complaint may still be referred by leave of the Court." But that is at common law, not under the statute. We cannot, however, avoid discharging this rule. It would be a stretch of our authority to restrain the arbitrator.

WILLIAMS J. Whether or not the legislature intended to include references on indictment in the thirty-ninth section of stat. 3 & 4 *W. 4. c. 42.*, is immaterial; but the proceeding is so rare that it probably was not thought of. The section clearly refers to cases where there is an ac-
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tion in court, or where parties to an action have consented to a clause for making the submission a rule of court, and such consent has been given, not through the order of nisi prius, but by agreement between themselves.

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COLERIDGE J. The provisions of stat. 3 & 4 W. 4. c. 42. s. 39. are for references of actions at common law, and references under the statute of *William 3.*

Rule discharged.

DAVID GRIFFITHS and Others *against* WALTER ANTHONY, and MARGARET, his Wife, Executrix of THOMAS GRIFFITHS. *Friday, November 11th.*

A RULE nisi had been obtained for a writ of prohibition to the Consistory Court of the Bishop of *St. David's*, to prohibit that Court from further proceeding in the suit between the above parties, and from awarding and enforcing costs, &c. The circumstances were as follows. *Thomas Griffiths*, by his will, bequeathed legacies to *David Griffiths* and the other parties agent in this suit, and left *Margaret Griffiths* his daughter (now *Margaret Anthony*) sole executrix. Upon his death, in 1819, *Margaret* (who soon afterwards married the respondent *Walter*) proved the will. In 1835 the respondents were cited, at the instance of the above mentioned legatees, to appear in the Consistory Court and exhibit an inventory. They did so; and the legatees filed exceptions to the inventory, alleging it to be fraudulent and imperfect. The respondents exhibited

An executor having exhibited an inventory in the Ecclesiastical Court, at the instance of legatees, the latter filed exceptions to the inventory, and the executor put in his answer. The Court examined witnesses *viva voce* as to the correctness of the inventory, and afterwards decreed that the inventory was false and fraudulent, and ordered it to be amended according to the Judge's minutes. This

Court, on motion by the executor, granted a prohibition.

Although the parties had consented to the examination being taken *viva voce*, and the executor had, after such examination, applied for leave to amend the inventory.

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their answer; and in *December* last the cause came on to be heard before the surrogate; whereupon (as was stated in the affidavit upon which the present rule was grounded) "the said Consistory Court proceeded to examine into the truth of the inventory, and of the reply to the said exceptions, by the examination of witnesses; whereby, as appeared to this deponent" (*Walter Anthony*), "and as he is advised, by means of loose and indefinite testimony, it was made to appear, or did appear, to the said Consistory Court, that the said inventory and account, and said answer to the said exceptions, were contradicted." At an adjourned hearing of the cause, witnesses were again examined as to the value of certain emblements which, it was said, belonged to the estate and were subject to the legacies. The affidavit filed on shewing cause admitted that examinations were taken *vivâ voce* before the surrogate, but stated that the proctors for both parties had consented to the witnesses being so examined for the sake of dispatch (a). The respondents' proctor applied to the Court for liberty to amend the inventory, but the surrogate proceeded to make a decree, which was, that the inventory was false, imperfect, and fraudulent, and must be amended according to the minutes to be deposited by the judge with the registrar, and that the respondents should pay the costs of the proceedings.

Chilton now shewed cause. If *Henderson v. French* (b) be considered as an unimpeached authority, and applicable to the present case (this being a suit promoted

(a) It was suggested on the argument that the consent was not to the examination itself, but only to the examining *vivâ voce*.

(b) 5 M. & S. 406.

by

by legatees, whereas that was at the instance of creditors), the rule for a prohibition cannot be resisted. In that case it was held that a consistory court could not hear exceptions to an inventory, the office of the bishop in receiving it being simply ministerial. But the practice in the ecclesiastical courts is to receive such objections, as is shewn in *2 Williams on Executors*, 646 (a), after noticing the contrary authorities in the King's Bench, of *Henderson v. French* (b), *Hinton v. Parker* (c), and *Catchside v. Ovington* (d). It may be contended here that, if the Ecclesiastical Court had authority to question the inventory, they still exceeded their jurisdiction by examining witnesses *vivâ voce*. But that was done by consent, to save time and expense. And, further, if any irregularity took place, the respondents have waived it by applying to amend the inventory.

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E. V. Williams, contra, was stopped by the Court.

LORD DENMAN C. J. *Henderson v. French* (b) is in point; and there is nothing like a waiver of the irregularity. The rule must be absolute.

(a) Part iii. book 2. c. 1. s. 3. 1st ed. In the second edition of Mr. Williams's Treatise, the present case is noticed, and the following observation subjoined, (p. 714. note ss): "It must, however, be observed, that in this case it appeared, by the affidavits on which the prohibition was granted, that the Ecclesiastical Court had permitted *witnesses to be examined* in support of the allegations given in objection to the inventory; which was clearly an excess of jurisdiction: so that, in fact, it was not necessary to decide the point which occurred in *Henderson v. French*." See *Telford v. Morison*, 2 *Add. Ecc. Rep.* 319., cited in the same work, vol. ii. p. 716.

(b) 5 *M. & S.* 406.

(c) 8 *Mod.* 168.

(d) 3 *Burr.* 1922. *Patteson J.* referred to *Hooper v. Leach*, 3 *Doug.* 434., as an analogous case.

1836. PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

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Rule absolute.

Saturday,
November 12th.

The KING against The Justices of MIDDLESEX.

Under the Highway Act, 13 G. 3. c. 78. s. 19., the justices in special sessions could not, by one and the same order, direct that a highway should be diverted, and that the old way should be stopped. Nor was any alteration made in this respect by stat. 55 G. 3. c. 68. (See stat. 5 & 6 W. 4. c. 50. s. 1., and sects. 82. to 91.)

Under stat. 13 G. 2. c. 18. s. 5., a certiorari to remove an order for stopping a highway may be applied for within six calendar months after such order has been confirmed at sessions, though more than six calendar months have elapsed since the order was made.

WIGHTMAN, in last *Easter* term, obtained a rule nisi for a certiorari to the justices of *Middlesex*, to remove into this Court an order of four justices for diverting and stopping up part of a certain public footway, and an order of sessions by which the former was confirmed. The first-mentioned order bore date *August* 3d, 1835, and adjudicated as follows:—"We do hereby order that the said part of the said public footway be diverted and turned through the lands aforesaid; and we do further order that the said part of the said public footway shall be stopped up according to the provisions of the statute in that case" &c.; and it was directed that the *Brewers' Company*, through whose lands the proposed new footway would pass, should take and accept the part of the old footway so ordered to be diverted, turned, and stopped up, in exchange for the proposed new way. The order of sessions confirming the order of justices was dated *October* 19th, 1835. The new footway was afterwards certified to be complete, and in good condition and repair, and the certificate was returned to the *January* sessions, 1836, and ordered to be enrolled.

Sir *J. Campbell*, Attorney-General, and *J. Greenwood*, now shewed cause. First, the certiorari has been moved for

for too late. Stat. 13 G. 2. c. 18. s. 5. enacts that no certiorari shall be granted "to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace," or at sessions, "unless such certiorari be moved or applied for within six calendar months next after" such order, &c., "shall be so had or made." The six months must be reckoned from the time of making the order; parties are not to lie by till it has been confirmed at sessions, and then apply, within six months of the order of sessions, to remove both. *Rex v. Boughey (a)* is the authority which comes nearest to this point. Then it will be contended, on the authority of *Rex v. The Justices of Kent (b)*, that there ought to have been separate orders for diverting and for stopping. But stat. 55 G. 3. c. 68. s. 2. (c), under which this order of justices was made, enacts in general terms that, in the case there mentioned, it shall be lawful for the justices in special sessions "to divert and turn and to stop up, such foot-way," &c.; and the form of notice given in the schedule (A.) speaks of "an order" "for turning, diverting and stopping up." The order is not, indeed, acted upon, as to stopping up, till a certificate has been made and enrolled under sect. 4; but there is no direction for making a fresh order at that period. It is enacted that the way shall then "be stopped up:" but stopping, and ordering to be stopped, are not synonymous. The appeal given by sect. 3 is against the order for stopping (diverting is not mentioned, because that, by sect. 2., must be done by consent of the owner; and no one else

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(a) 4 T. R. 281.

(b) 10 B. & C. 477.

(c) Repealed by the General Highway Act, 5 & 6 W. 4. c. 50. s. 1.
But see sects. 82 to 91, and the forms, xviii and xix, in the schedule.

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is likely to have an interest in appealing); and, if there be no appeal against the *order for stopping*, or if it be confirmed, the way is to *be stopped*. It is reasonable that, before the new road is made, the parties making it should be sure of an order for stopping the old. In *Rex v. The Justices of Kent (a)* Lord Tenterden seems not to have sufficiently considered the enactments of stat. 55 G. 3. c. 68.; and, in adverting to the schedule, he proceeded upon a ground not taken by counsel, and did not notice the words “an order” — “for turning, diverting, and stopping up.”

Wightman, contra. The present rule must be made absolute, if the judgment of Lord Tenterden in *Rex v. The Justices of Kent (a)* is to be supported. As to the certiorari, *Rex v. Sheppard (b)*, recognised in *Rex v. The Justices of Kent (a)*, shews that it is not taken away in cases under stat. 55 G. 3. c. 68.; and also that it is grantable to remove the order when confirmed at sessions, though more than six months after the original order was made. Then as to the other point. Stat. 55 G. 3. c. 68. s. 1. repeals sect. 19 of the old Highway Act, stat. 13 G. 3. c. 78., which provided for the diverting and stopping of footways and other highways; but sect. 2, in effect, re-enacts it, prescribing “such ways and means,” and making the powers “subject to such exceptions and conditions in all respects” as were mentioned in the former act with regard to highways to be widened or diverted. These regulations of stat. 13 G. 3. c. 78. were considered as incorporated with the subsequent act in *Rex v. The Justices of Worcestershire (c)*.

(a) 10 B. & C. 477.

(b) 3 B. & Ald. 414.

(c) 2 B. & Ald. 228.

Then

Then the "ways and means," "exceptions and conditions," referred to in the later act, must be looked for in stat. 13 G. 3. c. 78. sects. 16, 17, (referred to by s. 19), and the forms xvi and xviii in the schedule, which clearly prescribe distinct orders for diverting and for stopping. And convenience, as well as the letter of the statute, requires that they should be separate. It is true that stat. 55 G. 3. c. 68. s. 2. empowers the justices "at some special sessions to divert and turn and to stop up such footway," as if the whole were to be done at one session; but the previous statute, in sect. 19, uses precisely the same words; and, by sect. 62 of that act, the special sessions may be adjourned from time to time. The object of stat. 55 G. 3. c. 68. was not to put the public in a less advantageous situation for contesting orders of justices, but, as appears by the recital of sect. 1, to give greater facilities for this purpose. The schedule (A.), which has been relied upon, contains, not the form of an order, but that of a notice merely, and its words cannot have a more extensive effect than those of sect. 2, to which it is appended.

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Lord DENMAN C. J. As to the objection, that the certiorari is out of time, there are authorities which sufficiently shew that the statute 13 G. 2. c. 18. refers, not to the time of making an order, but to the time at which the sessions act with regard to it. As to the second objection, a good deal of doubt has been raised with respect to the order in question; but, upon the words of the statute 55 G. 3. c. 68., I think no fair doubt remains. Sect. 2 of that act directs that the justices shall "divert and turn" and "stop up" as is there mentioned, "by such ways and means, and subject to

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such exceptions and conditions in all respects," as are stated in the previous act, 13 G. 3. c. 78. "in regard to highways to be widened or diverted." Now what are those ways and means? They are to be found in sects. 16 and 19 of the earlier act, and the forms given in the schedule (a); and in those enactments and forms no provision appears for making the order to divert and the order to stop in the same instrument. The certificate of completion, required by sect. 4 of the later act, is evidently not substituted for a second order, because the same certificate is required, in similar terms, by stat. 13 G. 3. c. 78. s. 19., which clearly contemplates two orders. It must therefore be taken, here, that separate orders are necessary for the diversion and the stopping up. If any doubt remained upon this point, the authority of Lord *Tenterden*, which is of the greatest weight on all occasions, must prevail; and he, in *Rex v. The Justices of Kent* (b), distinctly rested his decision on the ground that the order was not only for making a new road, but also for stopping up the old, and that the statute gave no power to make such an order. On that authority, and these reasons, I am of opinion that the present rule must be absolute.

PATTESON J. I am of the same opinion. As to the first point, I think that, if an appeal has been heard, and a certiorari is moved for within six months after the order is confirmed on such appeal, it is sufficient. If this were otherwise, the party aggrieved would not have his two remedies; for, if he were obliged to remove the order within six months, he

(a) See *Rex v. The Justices of Cambridgeshire*, 4 A. & E. 111.

(b) 10 B. & C. 477.

would

would often lose the opportunity of an appeal on the merits, the order being withdrawn from the sessions. There is no direct authority on the point; but in *Rex v. Sheppard (a)* the objection as to time might have been taken; and the question, whether or not a certiorari lay, was before the Court. With respect to the other question, upon the words of stat. 55 G. 3. c. 68. s. 2, which enables the justices "by order" to divert and turn and to stop up the ways spoken of, I should have thought that a single order was sufficient for both purposes; but the words, "by the same ways and means, and subject to such exceptions and conditions," refer to sects. 16 and 19 of the former Highway Act, the latter of which sections has similar words of reference to sect. 16, and directs, in language like that of stat. 55 G. 3. c. 68. s. 4, that no stoppage of an old highway shall take place till after certificate of the new way being complete. I do not know of any express decision as to the necessity of two orders, for diverting and for stopping up, under the former act: but it is plain, from the forms given in the schedule to that act, that two orders are there contemplated. If there were any doubt upon the point, as arising on the later statute, we have an authority in *Rex v. The Justices of Kent (b)*; and I should think it best to follow a former decision unless we were satisfied that it was erroneous.

WILLIAMS J. With respect to the second point, under the old Highway Act two orders were clearly necessary. Then does stat. 55 G. 3. c. 68. repeal that act, as to the necessity of a second order? If there

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(a) 3 B. & Ald. 414.

(b) 10 B. & C. 477.

were

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were no previous decision, I do not know how this might be; but the very point has been already determined in *Rex v. The Justices of Kent (a)*, and not by Lord *Tenterden* only, but by *Littledale J.* also, who impliedly accedes to his ground of decision, by saying, "there is *another* fatal objection to the order, viz. that it does not contain any statement that the justices have viewed the course proposed for the new road." I think we ought to abide by the decision coming to us from such authorities, unless we were perfectly clear that it ought not to be followed; and I cannot say I am satisfied that stat. 55 G. 3. c. 68. dispenses with the two notices required by stat. 13 G. 3. c. 78. That act is referred to in strong terms by the later one, as regulating the mode in which the diversion and stopping of ways shall take place. If the legislature had intended so great an alteration as the introducing of one order to answer the purposes of the two which were required before, I should have expected that a new form would have been given.

COLERIDGE J. I have no doubt on the first point, though there is no case which expressly decides it. It is taken for granted in *Rex v. The Justices of Sussex (b)*, that the six months date from the order of sessions. The certiorari here was in time as far as regarded the order of sessions; and the question is whether that, being removable, drew with it the former order? I think that the limitation of stat. 13 G. 2. c. 18. cannot at any rate apply where the first order is of no effect unless enrolled at the sessions. On the second point I have had great doubt. Reading the provisions of

(a) 10 B. & C. 477.

(b) 1 M. & S. 631, 734.

55 G. 3. c. 68., only, I should have thought the machinery of the act better if, according to the argument of Mr. *Greenwood*, the justices were at one and the same time to consider whether or not the old road should be stopped, and to make the order for stopping as well as diverting it. Nobody would object to the order for diverting; and it would be better that the order for stopping should be made *uno flatu* with it, while the attention of those who might be affected was drawn to the subject. And this appears to be contemplated by the section requiring a certificate before the old highway is stopped; for, if there is to be a second order for stopping, I do not see why this preliminary should be required. But we are so tied up, in the interpretation of this statute, by the words, "such ways and means," and "such exceptions and conditions in all respects as in the said recited act is mentioned," that I think we could not depart from that construction which has now been adopted by the Court. We are fettered by the language of the statute; and we have also the opinion pronounced upon the point by Lord *Tenterden*. He may be a little incorrect in saying that there is no form in the schedule, applicable to the making of one order for the two purposes; but still we must pay deference to the opinion of so great a Judge, who, besides, was particularly conversant with this branch of law.

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Rule absolute.

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Tuesday,
November 15th.

SYMS against CHAPLIN and Others.

Plaintiff sent a parcel, directed to a person in London, to the postmaster of Bradford, to be forwarded to Melksham. The postmaster received 2d. to book the parcel, and sent it by a mail cart to the *King's Arms Inn* at Melksham. He was accustomed so to take in parcels for the mail cart. The innkeeper at *M.* booked the parcel for London, charging 2d. as "booking," for his own trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail coach, of which the defendants were proprietors, to London. Several coaches used to stop at the *King's Arms*; the mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-office was kept at the *King's Arms*. The parcel was lost.

Held, first, that, for the purpose of taking in the above parcel, the *King's Arms* was a receiving house of the defendants, within stat. 11 G. 4. & 1 W. 4. c. 68. Secondly, that the plaintiff might properly sue the defendants on a contract to carry from Melksham to London.

The defendants pleaded non assumpsit, and that the parcel contained property within the description in stat. 11 G. 4. & 1 W. 4. c. 68. s. 1., above the value of 10*l.*; that it was not delivered at a receiving house of the defendants, but to their servant; and that plaintiff did not, at the time of delivering the same to such servant, declare the value of the parcel, nor did he ever pay any increased rate of charge for it. Replication, *de injuriâ*. The jury found that the house was a receiving house of the defendants, and it appeared that no notice was affixed there pursuant to sect. 2 of the statute. The defendant, in moving for a new trial, contended that, independently of the enactments in those sections, the plaintiff could not recover, not having declared the value of the parcel to their servant, and such declaration being, by sect. 1, a condition precedent to the recovery of damages for loss of any goods there mentioned, exceeding 10*l.* in value.

Held that, on the third plea, and the finding of the jury, this objection could not be maintained.

And that, since the new rules of pleading, *Hil.* 4 W. 4., such defence was not open on non assumpsit.

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M. to *London*, and there, to wit at *London* aforesaid, safely deliver the same for plaintiff. And, although defendants, as such carriers, then had and received the said certificate for the purpose last aforesaid, yet defendants, not regarding their duty &c., nor their said promise &c., have not &c. (stating breach of the alleged promise in its several particulars), but, on the contrary thereof, defendants, being such carriers as aforesaid, so carelessly and negligently behaved and conducted themselves with respect to the said certificate, that, by and through the mere carelessness, negligence, and improper conduct of defendants and their servants in that behalf, the said certificate, being of the value aforesaid, afterwards, to wit on &c., was lost. By means whereof, &c. (alleging special damage).

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Pleas. 1. That defendants did not promise &c. 2. That plaintiff did not cause the said certificate to be delivered to defendants for the purpose in the declaration mentioned in manner and form &c. 3. That the said certificate was delivered by plaintiff for the purpose of being carried and conveyed as in the declaration mentioned, after the passing of a certain act made in the first year of *W.* 4, intituled &c. (a); and that the

(a) Stat. 11 *G.* 4. & 1 *W.* 4. c. 68. is entitled "An Act for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof." Sect. 1., after reciting that, by reason of the circumstances there mentioned, the responsibility of mail contractors, stage coach proprietors, and common carriers for hire, is greatly increased, and that, "through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors," &c. "by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with

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the said certificate was and is a certain writing within the meaning of the said act, and that the value thereof exceeded 10*l.*; and that the said certificate was not delivered at any office, warehouse, or receiving house
of

with knowledge of notices published by such mail contractors," &c., "with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;" enacts that no mail contractor, stage coach proprietor, &c., shall be liable for the loss of any article of property of the descriptions following, viz. &c. (enumerating a number of articles, among which are "writings"), "contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles of property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Sect. 2. enacts, "That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Sect. 3. enacts, among other things, that, if "such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible

of defendants as such common carriers as aforesaid, but that the same was delivered to and received by a certain then servant of defendants in that behalf; and that plaintiff did not, nor did any other person on his behalf, at the time when the said certificate was so delivered to and received by the said servant of defendants as aforesaid, declare the value and nature thereof, nor did the plaintiff then, or at any other time, pay to defendants, or to their said servant who so received the said certificate, or to any other person or persons on behalf of defendants, any increased rate of charge over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever; nor did defendants, or any or either of them, or the said servant who so received the said certificate as aforesaid, or any person on behalf of defendants, then or at any other time accept any engagement to pay the same. Verification.

Replication to the third plea, that defendants of their own wrong, and without the cause by them in their last plea alleged, were guilty of the breach of promise, &c., in manner and form &c. Conclusion to the country.

On the trial before *Williams J.*, at the last Summer assizes for *Wiltshire*, it appeared that the defendants

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sponsible as at the common law, and be liable to refund the increased rate of charge."

Sect. 5. enacts, "that for the purposes of this act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor," &c.

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were the proprietors of the *Bath* and *Bristol* mail. The certificate in question was enclosed in a parcel, addressed to a house in *London* (but with no special direction as to the coach by which it should go), and was sent to the post-office at *Bradford, Wilts*, from whence it was forwarded to *Melksham*. The postmaster of *Bradford, Johnson*, received it in the post-office; the servant who brought it paid 2*d.* to book it. No notice was put up at the post-office as to parcels. *Johnson* was accustomed to receive parcels, and deliver them to the driver of a mail cart, who carried them to *Melksham*, six miles distant. The cart was employed by *Tucker*, the mail contractor at *Melksham*, (who was not one of the present defendants); *Johnson* received the parcels for *Tucker*, and knew nothing of the defendants. If any person wished to pay carriage to *London*, he received the money. The driver of the mail cart, who accounted with *Tucker*, received the parcel in question with others from *Johnson* the postmaster, and delivered them at the *King's Arms* inn, *Melksham*. The innkeeper at *Melksham, Bird*, took in the parcel in question, and delivered it to the coachman of the *London* mail. The carriage from *Bradford* to *Melksham* was charged upon the parcel; the coachman paid *Bird* the amount, and "charged it on." *Bird* used to receive parcels to be forwarded by the mails, and by other coaches; he booked them, and kept 2*d.* for the booking, as a recompence for the care of the parcels. He had no authority from the mail-coach proprietors to book, nor had he ever been applied to by them to receive parcels. When the carriage from *Melksham* forward was paid at the *King's Arms*, he delivered the money to the coachman. There was no regular booking-office; parcels were taken in at the bar;

bar; and there was no notice exhibited as to the rate of charges. Several coaches used to call at the *King's Arms*; for two years and a half the mail had been accustomed to pull up there, but not to change horses. No statement was made on the plaintiff's behalf, as to the value of his parcel, either at the *Bradford* post-office or at the *King's Arms*.

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The defendants' counsel contended that the plaintiff ought to be nonsuited, upon grounds which will appear from the following report. The learned Judge reserved leave to enter a nonsuit, and left the case to the jury, directing their attention particularly to the third plea, and to the question raised by that plea, whether or not the *King's Arms* was a receiving house of the defendants: and he told them that, if it was, the third plea was not proved. The jury found a verdict for the plaintiff; damages 25*l*.

Bompas Serjt. in this term (*November* 3d) moved for a rule to shew cause why a nonsuit should not be entered. First, on the facts proved, the *King's Arms* was not a receiving house of the defendants. The postmaster of *Bradford* received no direction that the parcel should go by any particular coach. He sent it by a mail cart, the driver of which received a separate payment for the carriage from *Bradford* to *Melksham*; and that payment was made by the landlord of the *King's Arms*, who received the amount again from the coachman to whom he delivered the parcel. Several coaches stop at the *King's Arms*, and it was in the landlord's discretion to select the coach by which the parcel should go. He receives no payment from the defendants, and has no commission from them to take in packages for them. If the owner himself had left the certificate at

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the *King's Arms*, it would not have been taken in there as at a receiving-house for the defendants. [*Coleridge J.* If there is an office at which three or four coaches call, is not it a receiving house for each?] The defendants here had not in any way appointed the *King's Arms* as their office. The mail did not even change horses there; it only pulled up. [*Lord Denman C. J.* The mail stops where the proprietors direct; it is an understood transaction.] That does not make the inn a receiving house for the mail. [*Lord Denman C. J.* If the landlord received the parcel generally, the receipt would become a receipt on behalf of the mail, when he put the parcel into the coachman's hand.] If so, there could not have been an extra charge made at the *King's Arms* on behalf of the defendants, under stat. 11 G. 4. and 1 W. 4. c. 68. s. 1., at the time when the parcel was delivered there, no person being then authorised to make such charge for the defendants; nor was the *King's Arms* a place at which notice of such charge could be given, under sect. 2.; and accordingly the third plea avers that the delivery was, in fact, not made at a receiving house or office of the defendants, but to their servant, that is, to the coachman at the time when he received it from the landlord.

Secondly, this being an action of contract, and not for a breach of duty, it is material to shew a contract between the plaintiff and the defendants. If he contracted, it was with *Johnson* the *Bradford* postmaster. *Johnson* received money for the booking of the parcel at *Bradford*; he forwarded it to *Melksham*, and the carriage from *Bradford* to *Melksham* was paid by the defendants. The contract declared upon is to carry from *Melksham* to *London*. Now, the defendants' contract at *Melksham* was with *Johnson* only: it was to pay the charges already incurred

incurred by him, and to send the parcel for him to *London*. If the plaintiff was party to any contract, it was when the parcel was delivered at *Bradford*, and at that time *Johnson* clearly was not the agent of the defendants. He was not bound to send the parcel to them, more than to any other person; and if he transmitted it by an improper conveyance, he was liable to the plaintiff for any consequent damage.

Thirdly, it is a condition precedent to the right of recovery against any carrier described in stat. 11 G. 4. & 1 W. 4. c. 68., for the loss of goods there specified, that the value, if above 10*l.*, should in all cases have been declared according to sect. 1. That is an independent enactment, and not affected by the particular provisions of sects. 2 and 3. Sect. 2 has reference entirely to the increased rate of charge demandable in the cases there mentioned; and sect. 3 prescribes the terms and conditions to be observed where the increased rate is demanded. The words, "shall not have or be entitled to any benefit" "under this act," refer to the case where the carrier has made the increased charge without performing the conditions. But it is not necessary that that charge should be made, nor, consequently, that the conditions should be fulfilled where the carrier does not make it. He is at all events entitled to the protection of sect. 1, if the article lost be of such a description and value as bring it within that enactment. [*Coleridge J.* It was so held in *Owen v. Burnett (a)*.] The question here may be, whether this defence is available under the third plea, the jury having found that the parcel was delivered at a receiving house, which the plea denies. But, upon the true construction of sect. 1,

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(a) 2 Cro. & M. 353. ; S. C. 4 Tyrwh. 133.

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that point is wholly immaterial. [Lord *Denman* C. J. It would be difficult to bring the case, as now put, within the third plea. The plea raises a different defence.] Enough was proved to raise this defence; and the plea is applicable if the merely superfluous parts be rejected.

LORD DENMAN C. J. On the first point, I cannot entertain a doubt. The *King's Arms* was an inn used by the defendants, had been some time in the habit of taking in parcels which were sent by their coach, and was adopted by them as their receiving house. I think it came within the third class of places ("office, warehouse, or receiving house") spoken of in the first two sections of the act, having been adopted as such a place by the defendants. As to the second point, I think that there was a contract between the defendants and the plaintiff. A carrier receiving goods undertakes to carry them to the party whose address is upon them; the fact of their coming to him through a series of agents does not prevent his being liable to the sender. He cannot throw back the liability upon the earliest agent. The third point is important, and is difficult with regard both to the construction of the act, and the effect to be given to the plea. We will take time to consider of it.

PATTESON J. It appears that the mail-coach was in the habit of stopping at the *King's Arms*, but did not change horses there; if it had, the case would have stood more favourably to the defendants, because then it might have been said that the mere adventitious circumstance of the coach occasionally taking in a parcel while changing horses did not make the inn a receiving house for the mail coach proprietors. But here it seems that the coach stopped for the express purpose
of

of taking parcels. The mode of remuneration for what had been done previously in respect of the parcel can make no difference. As to the persons contracting, the evidence shews that the postmaster at *Bradford* did not undertake to convey the parcel to *London*, but only to forward it to the inn at *Melksham*; his responsibility would cease there; and it is clear upon the evidence that that was the understanding. On the delivery at *Melksham* the innkeeper there became the agent; and, if the inn was a receiving house of the defendants, he was their servant for the purpose of receiving the parcel. On the third point there is some difficulty.

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COLERIDGE J. The plaintiff in this case, wanting to transmit a parcel to *London*, sends it to *Johnson*, the postmaster of *Bradford*, who receives two-pence on account of it, and delivers it to a person by whom it is carried to the inn at *Melksham*. What is the inference from these facts? That there was a contract between the plaintiff and *Johnson*, not for sending the parcel to *London*, but for sending it to *Melksham* to be forwarded. When that was done, *Johnson* had performed his duty and earned his reward. Then as to the house at *Melksham*. It seems that for two years and a half the mail had stopped there to receive parcels. In all common understanding that made it a receiving house for the mail. We must take it that the coach stopped there by direction of the proprietors. It is said that the inn was not a receiving house for them, because other coaches stopped there, and the innkeeper had his option of sending the parcel by any, and that, not receiving for one in particular, he could not be the agent of that one. But, construing the facts as reasonable

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men, we must say that, as soon as the innkeeper determined upon the coach by which he would send, he became, for that purpose, the agent of the proprietors. On this part of the case we may dismiss from consideration what occurred up to the delivery of the parcel at the inn. It would have made no difference if the plaintiff had brought it there with his own hands, or sent it by his livery servant.

WILLIAMS J. The great contest at the trial was, whether or not the inn was a receiving house of the defendants. I agree with the rest of the Court, that the facts equally dispose of both the first and the second objection. The fifth section of stat. 11 G. 4. & 1 W. 4. c. 68. says that "every office, warehouse, or receiving house which shall be *used* or appointed by any mail contractor," &c., for the receiving of parcels shall be deemed the receiving house of such contractor, &c. No formal appointment is required. The contract of the defendants began from the place where their coachman received the parcel.

As to the remaining point,

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. The question which remained for our consideration in this case was, whether, upon the third plea, the plaintiffs were entitled to recover, and we think they are, the jury having found that the parcel was taken in at a receiving house of the defendants. Then the question is, whether the defence which was suggested under that plea can be made available under the general issue.

issue. *Owen v. Burnett* (a), which was referred to in moving, was decided before the new rules of pleading. Since the new rules, we think that this defence cannot be admitted on a plea of non assumpsit. No rule, therefore, can be granted.

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Rule refused (b).

(a) 2 Cro. & M. 353. S. C. 4 Tyrwh. 133.

(b) See *Gilbart v. Dale*, ante, p. 543.

Sir JOHN SCOTT LILLIE, Knight, *against* PRICE. *Tuesday, November 15th.*

DECLARATION (1836) for libel contained in a letter. Plea, Not Guilty. On the trial before Lord Denman C. J., at the sittings in *Middlesex* after last *Trinity* term, the defence was, that the alleged libel was a privileged communication. The defendant's counsel objected that this answer could not be given under the plea of not guilty. The Lord Chief Justice thought otherwise, and left the whole case to the jury, who found for the defendant.

In an action for libel, it is not required by the rules of pleading, *Hil. 4 W. 4.*; that the defence of privileged communication should be specially pleaded.

Sir *W. W. Follett* in this term (a) moved for a rule to shew cause why a new trial should not be had, on the ground of misdirection. It has never yet been decided that in an action for libel the defence of privileged communication may be set up, under a plea of the general issue. The point was brought before the Court of Common Pleas, but not decided, in *Smith v. Thomas* (b). In the rules, *Hil. 4 W. 4.*, *Pleadings in*

(a) November 5th. Before Lord Denman C. J., *Patteson, Williams, and Coleridge* Js.

(b) 2 New Ca. 372.

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the said certificate was and is a certain writing within the meaning of the said act, and that the value thereof exceeded 10*l.*; and that the said certificate was not delivered at any office, warehouse, or receiving house of

with knowledge of notices published by such mail contractors," &c., "with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;" enacts that no mail contractor, stage coach proprietor, &c., shall be liable for the loss of any article of property of the descriptions following, viz. &c. (enumerating a number of articles, among which are "writings"), "contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles of property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Sect. 2. enacts, "That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Sect. 3. enacts, among other things, that, if "such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible

of defendants as such common carriers as aforesaid, but that the same was delivered to and received by a certain then servant of defendants in that behalf; and that plaintiff did not, nor did any other person on his behalf, at the time when the said certificate was so delivered to and received by the said servant of defendants as aforesaid, declare the value and nature thereof, nor did the plaintiff then, or at any other time, pay to defendants, or to their said servant who so received the said certificate, or to any other person or persons on behalf of defendants, any increased rate of charge over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever; nor did defendants, or any or either of them, or the said servant who so received the said certificate as aforesaid, or any person on behalf of defendants, then or at any other time accept any engagement to pay the same. Verification.

Replication to the third plea, that defendants of their own wrong, and without the cause by them in their last plea alleged, were guilty of the breach of promise, &c., in manner and form &c. Conclusion to the country.

On the trial before *Williams J.*, at the last Summer assizes for *Wiltshire*, it appeared that the defendants

sponsible as at the common law, and be liable to refund the increased rate of charge."

Sect. 5. enacts, "that for the purposes of this act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor," &c.

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and watching the town of *Harwich*," "and supplying the same with water" (a) ; for that, whereas, after the passing

(a) Sect. 1. appoints certain commissioners for carrying the act into execution ; and several following sections provide for the future appointment, &c., of commissioners.

Sect. 5. enacts, " That all acts, proceedings, matters, and things in or relative to the execution of this act, may be done and executed by any five or more of the commissioners appointed, or to be appointed by or under this act, except only in cases herein particularly directed to be done and executed by any greater or less number of them."

Sect. 15. enacts, " That the said commissioners may sue or be sued for or concerning any thing *which shall be done by virtue or in pursuance of this act*, in the name of their clerk for the time being."

Sect. 16., and several following sections, enable the commissioners to make rates, to be assessed, allowed, &c., as therein directed.

Sect. 75., in order to enable the commissioners to put this act into immediate execution, enacts, that it shall be lawful for the commissioners " from time to time to borrow and take up at interest any sum or sums of money for the purposes of this act, upon the credit of the said rates, not exceeding the sum of 7000*L*," and by writing under their hands and seals, at any meetings to be held as before mentioned, " to assign all or any part of the said rates to such person or persons as shall lend or advance any money thereon as a security for the payment of the principal money so to be advanced, with interest for the same ; and every such mortgage or assignment shall be in the words, or to the effect following ; *videlicet*,

" ' By virtue of an act of parliament passed in the fifty-ninth year of the reign of his Majesty King *George the Third*, intituled,'" &c., " ' We, five of the commissioners appointed by and under the said act, at a meeting held pursuant thereto, in consideration of the sum of _____, advanced and lent by *A. B.* upon the credit and for the purposes of the said act, do grant, assign, bargain, and sell unto the said *A. B.* his executors, administrators, and assigns, such part or proportion of the rates to arise by virtue of the said act as the said sum of _____ doth or shall bear to the whole sum which now is or may at any time be lawfully borrowed or become due, or be charged or raised upon the said rates, to be had and holden from this _____ day of _____, until the said sum of _____, with the interest for the same, at _____ per centum per annum, shall be repaid and satisfied.' "

Sect. 76. enacts, " That it shall and may be lawful for any person or persons to contribute, advance, and pay to the said commissioners, *for the purposes*

ing of the said act, to wit 29th *November* 1820, the plaintiff contributed, advanced, and paid to the commissioners so appointed a certain sum, not exceeding in the whole, together with all money then or theretofore advanced upon mortgage, as in the act mentioned, the sum of 7000*l.*, that is to say 1350*l.*, for the absolute purchase of an annuity to be paid and payable during

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purposes of this act, any sum or sums of money not exceeding in the whole, together with the money to be advanced upon mortgage as aforesaid, the sum of 7000*l.*, for the absolute purchase of one or more annuity or annuities, to be paid and payable during the natural life of the person or persons so contributing," or of his or their nominees; "which annuity or annuities shall be payable and paid by the said commissioners out of the money to arise by or from the said rates; and the grant of every such annuity shall be in the words or to the effect following; (that is to say),

" 'By virtue of an act' " &c. (as in the preceding form), " 'We, five of the commissioners' " &c. (as before) " 'in consideration of the sum of , advanced and paid to us by *A. B.* do hereby grant unto the said *A. B.* his executors, administrators, and assigns, one annuity or yearly sum of out of the rates granted and to arise by virtue of the said act, which annuity or yearly sum of shall be paid to the said *A. B.* his executors, administrators, and assigns, by four equal quarterly payments in every year, during the natural life of , at or in the Guildhall of *Harwich* aforesaid, and the first payment thereof shall be made upon the day of next ensuing the date of these presents. Dated this day of . "

Sect. 91. provides, that no action shall be commenced against any person "*for any thing done in pursuance of this act*," until fourteen days notice thereof be given to the commissioners' clerk, "or after sufficient satisfaction or tender thereof to the party aggrieved, or after six calendar months next after *the fact committed*" &c.; and the defendant in every such action may, at his election, "plead specially or the general issue, and give this act and the special matter in evidence," "and that the same was done in pursuance and by the authority of this act."

Sect. 92. enacts, "That all monies which shall be raised by the said commissioners under or by virtue of this act, or which shall come to their hands for the purposes thereof, shall be applied from time to time in defraying the costs, charges, and expenses first of obtaining this act, and afterwards of carrying the same into execution, and to and for no other use or purpose whatsoever."

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the natural life of the plaintiff; and thereupon, by :
certain grant then made according to the said statute,
five of the commissioners appointed &c. did, by virtue
of the said act, at a certain meeting held pursuant
thereto, in consideration of 1350*l.* advanced and paid
to them by the plaintiff, grant unto the plaintiff, his
executors, &c., an annuity or yearly sum of 140*l.* 8*s.*,
out of the rates granted and to arise by virtue of the
said act, to be paid to the plaintiff, his executors, &c.,
by four equal quarterly payments in every year during
the life of the plaintiff, at or in the Guildhall of *Har-*
wich, and that the first payment thereof should be made
upon the 1st of *March* then next ensuing; averment,
that, after the making of the said grant, to wit 1st of
December 1834, a large sum, to wit 35*l.* 2*s.*, for one
quarterly payment of the said annuity, became and was
due and payable to the plaintiff, whereof the commis-
sioners had notice, and that, before and at the time at
which the last-mentioned quarterly payment became
due, the commissioners had received and then held in
their hands, out of the rates granted and arising by
virtue of the said act, divers large sums of money more
than sufficient to pay and satisfy the said quarterly pay-
ment; and the commissioners were then requested, at
and in the Guildhall &c., to pay the said quarterly pay-
ment or cause the same to be paid to the plaintiff;
and it thereupon became the duty of the commissioners
to pay the said quarterly payment, or cause the same to
be paid, to the plaintiff, at or in the Guildhall &c.; yet
the said commissioners, not regarding their duty in that
behalf, did not nor would, when so requested &c., or at
any other time, pay the said quarterly payment or any
part

part thereof, or cause the same or any part thereof to be paid, to the plaintiff, at or in the Guildhall &c., or at any other time, place, &c.; and the same still remains wholly due &c. There were similar breaches alleged as to quarterly payments becoming due respectively on 1st *March* 1835, and 1st *June* 1835. Damages 500*l*.

Plea. (2d.) That it was not the duty of the commissioners to pay or cause to be paid to plaintiff the said several quarterly payments in the declaration mentioned, in manner and form &c. Conclusion to the country.

Demurrer, assigning for causes, that the said second plea is multifarious, seeking to put in issue all the matters of fact stated in the declaration which respectively precede the assertion of the liability of the commissioners to pay the respective instalments of the annuity; and, further, that the defendant has attempted to put in issue that which is a mere inference of law resulting from the matter of fact by which the liability of the commissioners is created. Joinder in demurrer.

Cresswell for the plaintiff. The plea either puts in issue all the facts in the declaration from which it is sought to raise the duty as a legal consequence, or it tenders an issue on the legal consequence: in either view it is bad. [The Court then desired him to confine himself to the declaration.]

First, the declaration shews a duty in the commissioners. By sect. 76 the annuities "shall be payable and paid by the said commissioners." Even without this express enactment, sect. 92 would raise the duty: for the act can be carried "into execution" only by their making the payments. The commissioners, by
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accepting the office, undertake the duty. This was held, where a duty was imposed only by charter, in *The Mayor and Burgesses of Lyme Regis v. Henley* (a), the acceptance of the charter being considered to be an undertaking of the duty. Then, in consequence of the duty not being performed, the action lies. It is laid down by *Eyre B.*, in *Sutton v. Johnstone* (b), "that every breach of a public duty, working wrong and loss to another, is an injury, and actionable." Here the duty, breach, and loss to the plaintiff are shewn. In *Com. Dig. Action upon the Case for Negligence* (A. 1.) it is said, "an action upon the case lies for a negligence in a man's duty, though it be a nonfeasance;" and 1 *Rol. Abr.* 105. *Action sur Case*, (M.), pl. 8. is cited. [*Cole-ridge J.* Would not mandamus lie?] A mandamus might perhaps issue to compel the commissioners to raise the money, if it were not raised; for perhaps they could not be sued for not raising it. But here they have received the money; and they are sued for not paying the party who claims. In *Keighley's Case* (c) it was held that, if a party be bound by prescription to repair a sea wall, and neglect to do it, and the Commissioners of Sewers thereupon necessarily charge all who hold lands, &c., with the repair, every person so charged may sue the party neglecting in case. In *Schinotti v. Bumsted* (d) the managers and directors of the lottery, under act of parliament, were held liable in case for not

(a) 3 B. & Ad. 77., affirming the judgment of the Court of C. P., *Henley v. The Mayor of Lyme*, 5 Bing. 91. The judgment in *K. B.* was affirmed on error in the House of Lords: *The Mayor and Burgesses of Lyme Regis v. Henley*, 1 New Ca. 222.

(b) 1 T. R. 509.

(c) 10 Rep. 139 a.

(d) 6 T. R. 646.

declaring

declaring a plaintiff's ticket to be the last drawn, it being so within the act, which would entitle him to 1000*l*. The objection that mandamus would lie might have been made there, if sustainable here. So case was brought in *Lacon v. Hooper* (a) against the Commissioners of Customs for neglect of duty, and no objection was made to the form of proceeding, the only question discussed being, whether there had been neglect in fact; and the plaintiff recovered. An action on the case lies for selling goods liable to toll, without paying the toll, though debt would lie; *Sprosley v. Evans* (b). This last point was also discussed in *Steinson v. Heath* (c); but no decision is reported. It will be objected that the commissioners ought to have been made defendants, and not the clerk. But this is a suit "concerning" a "thing" "done by virtue or in pursuance of this act;" and therefore it is within sect. 15. It is a nonfeasance of a duty created by the act. The clause would otherwise be almost nugatory. The annuity is granted under the act: all matters relating to the annuity are therefore within the clause. For all such matters the clerk represents the commissioners. If the enactment had been in general terms, that the commissioners should sue and be sued in the name of the clerk, the objection could not have been made; yet such an enactment would, in truth, carry the case no further than the present one; for it would be construed to relate only to actions concerning things to be done under the statute. The question must always be, whether the commis-

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(a) 6 T. R. 224.

(b) 1 Rol. Abr. 103. *Action sur Case*, (K.), pl. 2. 1 Vin. Abr. 598. *Actions [Case. Gist.]*, (K. c), pl. 2.

(c) 3 Lev. 400.

sioners

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sioners are, so far as the subject-matter of the action goes, to be treated in that character, and not as individuals; where that is so, the clerk is a proper party.

Ogle, contra. The first question, upon the declaration, is, whether the commissioners be liable, so that the action can be supported in any form or against any party. Sect. 75 enables them to borrow money, not upon their own credit, but upon that of the rates, and to assign a proportion of the rates in return. No credit is therefore given to them personally. Then, by sect. 76, they may grant annuities payable out of the rates to persons contributing. And the declaration charges, that they did so grant to the plaintiff. In *Horsley v. Bell* (a) the commissioners of a river navigation were held to be personally liable to a party who had been engaged by them to perform the work, on the ground that the credit was given to them, not to the undertaking. That reasoning shews that there is no personal liability here; for the statute expressly enacts that the credit shall be given to the rates. *Eaton v. Bell* (b) may appear to shew a personal liability in the commissioners. But there the commissioners made themselves personally liable by their drafts: the act of parliament there, which simply directed that persons advancing money should be repaid out of the rates raised under the act, gave no remedy on the drafts, which were not instruments directed to be made by the act, and which, therefore, fell under the general rule applicable to drafts. And, as the commissioners there chose to draw for the sums "on account of the public drainage," they were estopped from

(a) *Amb.* 770. & C. 1 Bro. C. C. 101. note.

(b) 5 B. & Ald. 34.

saying

saying that they had no public funds. Here there is simply a grant of the annuity under the words of the act. It may be said that the commissioners are concluded from denying, on this demurrer, the receipt of the funds for paying the plaintiff; and that so far the case falls within the principle suggested as explaining *Eaton v. Bell* (a). But the averment in the declaration is, that the commissioners have received, not enough for the quarterly payments on the whole sum advanced, but only enough for the quarterly payments to the plaintiff. What right has any one annuitant to claim priority of payment before another? Further, supposing the commissioners liable, and that therefore some action lies, the remedy is on the contract for the annuity, which will make the commissioners liable (if at all) in covenant, supposing the grant under seal, or in assumpsit, supposing it not under seal. It rather seems that the instrument should be under seal; for that is expressly enacted with respect to the assignment of the rate, in sect. 75: and the word "grant" is used in sect. 76. But, whether the annuity instrument be a deed or not, there arises a contract to pay, either special or simple, supposing the commissioners to be liable at all. Case, therefore, cannot be supported. As to the party, an action on the case can be supported only against the parties guilty of the tort. Now all that can, at the utmost, be inferred from sect. 15, is that the clerk may be sued in all cases where the whole body of commissioners would be liable; *Everett v. Cooch* (b). There any five or more trustees under a turnpike act were required to make compensation to a lessee whose term

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(a) 5 B. & Ald. 34.

(b) 7 Taunt. 1.

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determined, by the act, on the first meeting of the trustees; and parties aggrieved by any thing done by the trustees were to sue the treasurer; and it was held that assumpsit, laying a promise by the trustees to make compensation in consideration of their liability, could not be maintained against the treasurer, because the trustees present when the promise was made could not, by their act, render all liable. So, here, if the grant of the annuity create a liability in the grantors to pay, it can be only a liability in the five acting under sect. 76: at all events, there cannot be a tort on the part of those who were no parties to it. But, further, sect. 15 has no application to a complaint of this kind. The "thing which shall be done by virtue or in pursuance of this act" must be understood in the same sense as the similar words in sect. 91. Now this last section is intelligible only if applied to cases of malfeasance or mis-feasance: there can be no six months "after the fact committed" in the case of a non-feasance. *Umphelby v. M'Lean (a)*, *Waterhouse v. Keen (b)*, *Abdy v. Stevens (c)*, establish this distinction. And, if the non-feasance be a thing done, within these two sections, the declaration ought to have averred due notice, and have shewn that the action was brought in time, within sect. 91. Further, the declaration ought to have averred that the plaintiff advanced the money for the purposes of the act: otherwise the proceeding is not under the act (sect. 76), and sect. 15 does not apply. With respect to the plea, the defendant had no other method of setting up his defence. The

(a) 1 B. & Ald. 42.

(b) 4 B. & C. 200.

(c) 3 B. & Ald. 299.

facts alleged in the declaration are true, except as to the allegation of duty. The duty could not arise unless the money raised were enough to pay all, the plaintiff having no right to priority: the traverse of the duty is, therefore, in fact, a denial that sufficient money to pay all was received. The absence of such facts cannot in general be taken advantage of under "Not Guilty;" *Frankum v. The Earl of Falmouth* (a). Sect. 91, indeed, enables the defendant to prove the special matter under the general issue: but it also reserves power to plead specially, as in other cases. It is objected that the traverse is multifarious: but it is only a traverse of all the facts together constituting the duty: that is not multifarious; *Stephen on Pleading*, 290 (b). As to the remaining objection, that matter of law is traversed here, it is a traverse of law mixed with fact, which may be taken; *Com. Dig. Pleader* (G. 5.).

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Cresswell in reply. It is contended that no credit was given to the commissioners, and also that the action ought to have been brought on their implied contract. These arguments are inconsistent. But it is true that no personal credit was given to the commissioners who made the grant. They acted in the name of all. This therefore does not fall within the objection which prevailed in *Everett v. Cooch* (c); and sect. 15 applies, the object of which was, that the parties might not be obliged to find out the names of a fluctuating body. This section cannot be interpreted by sect. 91, the object of which was different, namely, to enable parties to offer compensation for acts done. The objection to the

(a) 2 A. & E. 452.

(b) Ed. 4.

(c) 7 Taunt. 1.

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plaintiff's claiming priority does not arise : the record does not shew that any party besides the plaintiff is unpaid or has even advanced money. As to the objection that the plaintiff is not stated to have advanced his money for the purposes of the act, the plea ought to have stated that it was not so advanced : in the absence of this, the Court cannot infer that the commissioners charged an annuity on the rates without power to do so. Or there should have been a special demurrer.

LORD DENMAN C. J. We have already intimated our opinion that the plea is bad : it tenders an issue upon an inference of law. Then the defendant objects, first to the form of action, secondly to the clerk being made the party. In the first place, the question is, whether the action for nonpayment of this money be "concerning" a "thing" "done by virtue or in pursuance of this act." The argument most strongly urged against it is derived from sect. 91, which speaks of six calendar months "next after the fact committed (*a*):" and it is said that, as one clause is correlative to the other, the clerk cannot be sued where there is no fact committed. But the language of the enabling clause is much more extensive than that of the other, which applies only to a case where a person is sued for something actually done. The clerk may be sued where the complaint arises, "for or concerning any thing which shall be done by virtue or in pursuance of this act;" and here the charge is created under the act. I do not see how the

(*a*) See the observations of Lord Ellenborough in *Rex v. Taunton St. Mary*, 3 M. & S. 471.

commissioners can be personally responsible. The act of the five is the act of all ; and the clerk represents them.

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Then comes the question, whether case is the proper form of action. I own that I felt much doubt on that point. I should have thought that the word "grant," whether the instrument was under seal or not, implied a contract, and that the proper form would be to sue in contract. But the consideration that the commissioners are not personally liable, and are executing a public trust, shews that they are liable to action for neglect of duty : and it is a neglect of duty not to perform their engagement. These, therefore, which were the two material objections, fail.

PATTESON J. I am of the same opinion. As to the plea, it is clearly a traverse of an inference of law : it puts in issue, not the facts out of which the duty is to arise, but the mere fact of its arising. I think the clerk is properly made defendant. The action is not brought against him as the real defendant, nor does the act make him so. The action is against the commissioners in the name of the clerk, as in *Wormwell v. Hailstone* (a). The question then is, whether the commissioners were here liable as a body. I admit that, if this were a contract binding the five commissioners personally, it might be said that only those five were liable, since the action must be on the contract ; and that no action on the case, or in any other form, would lie against all. But, inasmuch as there is nothing here binding them personally in any way, as there is merely a grant out of

(a) 6 Bing. 668.

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the rates, and no agreement by them to pay at all events, they are mere instruments to make the grant. Then it becomes the duty of the body at large to pay when they have funds. They may, therefore, be sued in the name of their clerk, provided the words of the clause on that subject are sufficient; and I think that they are, and that we see the intention of the legislature clearly. The words of sect. 15 are "for or concerning any thing which shall be done by virtue or in pursuance of this act." Those are different from the words in sect. 91. No doubt the grant of the annuity is a thing done in pursuance of this act; and the plaintiff, being the party to whom the grant is made, sues "concerning" a thing so done. If the words "or concerning" were left out, the remedy might be limited to actions for acts done: and sect. 91 is so limited.

Then, is case the proper form of action? There is no contract: neither assumpsit nor covenant could be brought, for no engagement is entered into by the commissioners who grant the annuity, either as a body corporate, or as individuals. The complaint is therefore for neglect of duty: the commissioners have the money, and have not applied it. It is objected that the plaintiff is not entitled to a priority before other creditors: but it does not appear that there are other creditors.

WILLIAMS J. I am of the same opinion. The plea obviously attempts to put in issue the law arising out of the facts. The facts might have been traversed. I do not accede to the objection against the action being shaped in case. A mandamus might be proper if there were no funds; but it stands upon the record that there are funds. Then it is said that the remedy should be taken
in

in contract; but that proceeds upon an assumption not warranted by the facts or words. By sects. 5 and 76, five commissioners represent the whole body; and, in the grant, they do not personally pledge themselves, but grant the annuity out of the rates. There is, therefore, no contract either by the five or by the whole body. Then how does the liability arise? Upon the allegation that there are funds sufficient to pay the Plaintiff; that shews a breach of duty for which case lies. As to the other point, I think the words of sect. 15 sufficiently large. An action for withholding payment when there are funds sufficient is an action "concerning" a thing done by virtue of the act.

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COLERIDGE J. I am quite of the same opinion. Mr. Ogle's argument, that the commissioners are not personally liable, does not apply with much weight to the question, whether any action lies at all: for, even if there were a sufficient liability in them to support some action, it would not follow that execution would issue against them personally, as appears from *Wormwell v. Hailstone* (a); though, indeed, that case turned on the particular words of the act. But the argument does apply with great weight to the question, whether the clerk is properly made a defendant on this record. For look at the circumstances and situation of the parties. The plaintiff advances money under the act. Then five commissioners grant the annuity in the terms of the act. If there be any personal liability at all, it is in those five, for it is impossible to say that the whole body

(a) 6 Bing. 668.

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are personally liable. They say they have granted an annuity out of the rates to arise ; that is all. Call it a contract, or what you will, what is it more than a receipt of the money by the commissioners acting under the statute, and a setting aside of so much money to arise under the statute ? It would be the height of injustice to say that they were personally liable. Then, if they are not personally liable, are they, as a body, properly sued in the name of the clerk ? The words of sect. 15 are as strong as they can be ; and we are not to restrain them, for the clause is a beneficial one, and tends to obviate difficulties, as, for instance, that arising from the change of commissioners. Surely the purchase of the annuity was something done by virtue of the act. I think, therefore, that this is a case within both the words and the spirit of the act. Then comes a question which is very different ; whether case be the proper form of action. Now for what, in substance, is the action brought ? Not to recover the sum advanced, but to obtain the payment of a sum which has been set aside for the annuity. The form of the action is therefore right.

Then the only question is, whether any fault can be found in the declaration, making it bad on general demurrer. There is no averment that notice of action was given, or that it was brought within due time within sect. 91. This objection was just mentioned, and seemed to be abandoned. I agree that the clause does not extend to this action. Then it is said that there is no averment that the money was advanced for the purposes of the act. Had this been specially assigned as a cause of demurrer to the declaration, I do not see how it could have

have been got over. But the defendant is limited to objections valid on general demurrer. Now the declaration alleges that the annuity was granted, by virtue of the act, in consideration of the advance; and it could not be granted by virtue of the act, unless the advance were made for the purposes of the act. It was also objected that the plaintiff was attempting to gain a priority over the other creditors; and it was said that the declaration ought to have alleged that there was money in hand sufficient to satisfy all the creditors. But the statement in the declaration is sufficient to exclude this objection. It is alleged that the commissioners had more than sufficient for the quarterly payment of the plaintiff's annuity. That could not be true, if the payment could be made only by an undue postponement of equal claims. This objection therefore fails, it being always remembered that the question arises as on general demurrer to the declaration.

Judgment for the plaintiff.

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Tuesday,
November 15th.

DOE on the Demise of HARRIS against
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By a local inclosure act it was provided, that the several lands, &c., to be allotted and awarded in pursuance thereof, immediately after such allotments were made, should be, remain and enure to the several persons to whom the same should be respectively allotted, who should from thenceforth stand and be seised and possessed thereof to the same uses, estates, trusts, and purposes, and subject to the same settlements, &c., charges and incumbrances, as the several and respective lands, &c., in lieu of which such allotments should be respectively made, were then held under, subject to &c., or might or would have been held under, &c., if this act had not been made.

The commissioners, in 1812, marked out an allotment, in lieu of lands belonging to S., and put him in possession, but their award (in which they made the same allotment to S. in lieu of the same lands) was not executed till 1825. In the meantime (1818), S. mortgaged the allotment.

Held that, under the above enactment, S. had legal seisin of the allotment from the time of his being put into possession, and might mortgage before execution of the award.

ON the trial of this ejectment at the *Oxfordshire* Summer assizes, 1835, a verdict was found for the plaintiff, damages 1s., subject to the opinion of this Court on the following case; the verdict to stand, if the Court should be of opinion that the plaintiff was entitled; otherwise to be entered for the defendant.

The lessor of the plaintiff claimed the premises, which were ten acres two roods of land, situate in the hamlet of *Chadlington West* and parish of *Charlbury*, as mortgagee of *Jonah Smith*, under deeds of lease and release of 17th and 18th *December* 1824, in the ordinary form, whereby *Smith* granted, released, and confirmed to *Harris* (inter alia), "A messuage and building, lands and premises, by the open field description, being half a yard land, late *Daniel Smith's*, and all such allotment or allotments, pieces or parcels of land or ground, and premises, which the commissioners acting under or by virtue of an act of parliament" (51 G. 3. c. xxv., local and personal, public, which act was to be taken as part of the case), "intituled, 'An Act for enclosing certain lands in the hamlets of *Chadlington West*,' " &c., "had set out only, or should set out, allot, and award in lieu of and satis-

faction

faction for the open field lands, grounds, and right of common of the estate of the said *Jonah Smith*, called 'late *Daniel Smith's*,' consisting of half a yard land," &c.

The commissioners duly made their award, *July 2d 1825*, and thereby set out and allotted, and awarded to *Jonah Smith*, in lieu of the open field lands, grounds, and right of common of his estate called 'late *Daniel Smith's*,' consisting of half a yard land, "one plot or parcel of land or ground situate in the hamlet of *Chadlington West*, at *Crooked Oak* furlong, containing ten acres and two roods, bounded," &c. (a).

The last-mentioned ten acres and two roods were the premises which the plaintiff sought to recover in this action. The whole of the title deeds relating to the property were placed in the hands of *Harris's* solicitor at the time of the execution of the mortgage deeds in 1824, and had continued in his possession ever since.

The defendant claimed to be a prior mortgagee, and put in an indenture of mortgage of *November 21st 1818 (b)*, whereby the said *Jonah Smith* granted and

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(a) Another plot or parcel was at the same time allotted to him in lieu of the same property.

(b) This indenture (which, with the other documents referred to, was to form part of the case) recited that *Jonah Smith* was seised in fee of the messuages, cottages, lands, and hereditaments after described; and, after some other recitals, it was thereby witnessed that *Smith* granted, bargained, sold, demised, and confirmed to *Saunder*, his executors, &c., 'all those freehold and tithe-free hereditaments and premises after-mentioned, that is to say, all that messuage or tenement, with the barns, &c., situate, &c., and also all those several plots or parcels of land "set out and allotted and awarded, or intended so to be, by the commissioners appointed and acting under and in pursuance of a certain act of parliament," &c., "unto the said *Jonah Smith*, in lieu of and compensation and satisfaction for his estates, late" &c., consisting &c., and part of late *Daniel Smith's*, that is to say, one plot or parcel of land, &c. (describing several parcels, and among them the ten acres and two roods mentioned in the text).

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demised for 500 years to defendant, his executors, administrators, and assigns (inter alia), "one plot or parcel of land or ground being one of the allotments in lieu of half a yard land late *Daniel's*, purchased by the said *Jonah Smith* of one *John Smith*, situate in the said hamlet of *Chadlington West* at *Crooked Oak* furlong, containing ten acres and two roods, &c.; following" (as the case stated) "the words of a description of the allotments which was delivered to him by authority of the commissioners in 1817, afterwards inserted in the award as above set out, and which shewed these lands to be the same sought to be recovered in the present action."

The defendant also put in indentures of lease and release of 28th and 29th *December* 1826, to which *Jonah Smith* was party of the first part, and the defendant of the second; and which, after reciting the indenture of mortgage of *November* 1818, reciting also that doubts had been entertained as to its validity, and whether at the time of its execution *Jonah Smith* was seised of the fee simple of the hereditaments and premises thereby demised, by reason that the commissioners had not then signed their award; and reciting also that the defendant had therefore requested of *Jonah Smith* such further assurance as was after mentioned, which *Jonah Smith* had agreed to give, further witnessed that, in pursuance of the said agreement, and in consideration of 5s., the said *Jonah Smith* did grant, bargain, sell, and demise, ratify, and confirm unto the defendant, his executors, &c., all the premises before mentioned and described (including those now in question) conveyed by the recited indenture of 1818, for the residue of the before-mentioned term of 500 years, for securing the

the sum of &c., and interest, as in the recited indenture was mentioned.

The commissioners set out the allotments, and, among other proprietors, put *Jonah Smith* in possession of this allotment of ten acres and two roods, in 1812, and he remained in possession till his death in 1827, since which, to the present time, his wife and the defendant have been successively in possession.

The sections of the local Inclosure Act, 51 G. 3. c. xxv., principally referred to in the subsequent argument, were the following. After various enactments giving powers to the commissioners and directing them to make certain allotments:—

Sect. 34. authorises and requires them to set out, divide, and allot all the residue of the lands to be divided, allotted, and inclosed under the act, “unto and amongst the several proprietors thereof and persons interested therein, in proportion and according to their several and respective lands, grounds, rights of common, and other rights and interest, in, to, and over the same.”

Sect. 43. enacts, “That if any person hath sold, or shall at any time before the execution of the award of the said commissioners, sell his, her, or their interest, right, title, or property in, over, and upon the said open fields, common pasture,” &c., “then and in every such case it shall be lawful for the said commissioners, and they are hereby authorised and required, with the consent in writing of such vendor or vendors respectively, to make an allotment or allotments of the land unto the vendee or purchaser in such sale, or to his or her heirs or assigns, for or in respect of such right, interest, and property so sold as aforesaid; and every such vendee or purchaser, and his or their heirs and assigns, shall

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shall and may, from and after the execution of the said award, hold and enjoy the lands so to be allotted to her, him, or them, as aforesaid, in the same manner to all intents and purposes as the vendor in every such sale might, could, or ought to have held and enjoyed the same in case such sale had not been made."

Sect. 46. enacts, "That the several lands and grounds so to be allotted and awarded upon the said division and inclosure to the several persons concerned, and the several messuages, lands, tenements, old inclosures, new allotments, and other hereditaments, which shall be exchanged in pursuance of this act or the said recited act, immediately after such allotments and exchanges are made as aforesaid, shall be, remain, and enure to the several persons to whom the same shall be respectively allotted or given in exchange as aforesaid, who shall from thenceforth stand and be seised and possessed thereof to such and the same uses, estates, trusts, and purposes, and subject to such and the same wills, settlements, limitations, powers, remainders, leases (except leases at rack rent) charges, and incumbrances, as the several and respective messuages, lands, tenements, old inclosures, or other hereditaments, in lieu of which such allotments or exchanged premises shall be respectively made or taken as aforesaid, are now held under, subject to or liable to be charged with, or affected by, or might or would have been held under, or subject to or liable to have been charged with, or affected by, in case this act had not been made."

W. J. Alexander for the plaintiff. The deed of November 1818 did not convey any legal estate to the defendant; it was only an equitable agreement for conveying allotments

allotments which were to be made to the grantor at a future time. But the legal estate in the half yard land, late *Daniel Smith's*, passed to the lessor of the plaintiff by the deeds of *December 1824*, and, that land being taken by the commissioners under the inclosure act, the allotments in lieu of it became vested in the lessor of the plaintiff upon the making of their award, by virtue of the award, and according to the provisions of the local act, 51 G. 3. c. xxv., sects. 43 and 46, and the general inclosure act of 1 & 2 G. 4. c. 23. In this respect, the Court will give the same effect to sect. 46 of the present inclosure act, as was given to a similar enactment in *Doe dem. Sweeting v. Hellard (a)*. The clause, as was said by *Bayley* and *Littledale Js.* in that case, must be construed liberally, so as to carry into effect the manifest intention of the legislature; and it will be held, according to the decision there, that the allotment vested, on the execution of the award, according to the legal interest at that time subsisting. Although possession of the allotment was given to *Jonah Smith* in 1812, he could have no legal seisin of it till the execution of the award. *Farrer v. Billing (b)* shews this; although neither that case, nor any that has been found, is precisely similar to the present. *Kingsley v. Young (c)*, which may be mentioned on the other side, was brought under the notice of this Court in *Farrer v. Billing (b)*, and can have no bearing on the present case; for, besides the particular provisions of the local inclosure act, there pointed out, the vendee, *Young*, who declined fulfilling his contract, on the ground that no legal title could be made to the allotment (the subject of the contract) till the commis-

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(a) 9 B. & C. 789.

(b) 2 B. & Ald. 171.

(c) 17 Ves. 468. S. C., on appeal, 18 Ves. 207.

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sioners should execute their award, had purchased with full notice of all the circumstances. But in *Lowndes v. Bray* (a), “where the estate was sold without any notice that it was recently allotted under an inclosure act, and it appeared *that the commissioners had not made their award*, and the act contained no clause authorising a sale before the award;” Lord *Ellenborough* held, “that the purchaser was warranted in refusing the title (b).” And in *Cane v. Baldwin* (c), where a vendee, under similar circumstances, had paid a deposit, the vendor undertaking to convey the freehold estate, Lord *Ellenborough* held that the vendee might recover back his deposit money. [*Coleridge J.* referred to *Doe dem. Dixon v. Willis* (d)]. That case is very shortly stated, and does not appear to have undergone much consideration. *Farrer v. Billing* (e) was not noticed in it; and it does not appear that the inclosure act, under which the allotment took place, may not have contained a clause giving effect to sales, like that mentioned in *Kingsley v. Young* (g). [*Coleridge J.* There is another report of *Doe dem. Dixon v. Willis* in 3 *Moore & Payne* (h)]. The case, however, is said to have been disapproved of and overruled by the Master of the Rolls in *Mortlock v. Kentish*, July 26th, 1833 (i). The deed of confirmation, executed in 1826, can avail nothing, if the preceding argument be correct.

Cripps, contra. Both parties claim by mortgages antecedent to the award; and the award vested a title

(a) 1 *Sugd. Vend. & Pur.* 342. 9th ed. (b) *Sittings after Trin. T.* 1810.

(c) 1 *Stark. N. P. C.* 65.

(d) 5 *Bing.* 441.

(e) 2 *B. & Ald.* 171.

(g) 17 *Ves.* 468.; 18 *Ves.* 207.

(h) 3 *M. & P.* 24. Nothing is said there of the terms of the local act; nor does it appear that *Farrer v. Billing* was cited.

(i) Not reported.

in the defendant, prior in point of time, and preferable, to that of the lessor of the plaintiff. The allotments of *Jonah Smith*, comprehending those now in question, were put into his possession in 1812. In 1817, wishing to mortgage the ten acres two roods set out as part of his allotments, he procured from the commissioners a description of that part, which he then mortgaged in the terms of the description furnished. Under sect. 46 of the local act, he had, from the time when the allotments were made, the same right in them as in the land for which they were substituted, that is an estate of freehold: and that estate he charged with the term of 500 years to the defendant, before executing any mortgage to the lessor of the plaintiff. *Farrer v. Billing (a)* does not affect the present case, because the local act there provided that, on sale of an allotment, the vendee might, *after execution of the award*, hold the allotted land as the vendor might have done if there had been no sale. Here, no restriction appears: and, in the present case, independently of the local act, the defendant's title is protected by stat. 1 & 2 G. 4. c. 23. (passed after the decision in *Farrer v. Billing (a)*), which, after reciting the inconvenience arising, because the owners of allotments under inclosure acts cannot distrain, &c., before the execution of the awards, by reason of the freehold or legal seisin not being vested in them, enacts, in sects. 1, 2, that every person to whom such allotment is or shall be made, and to whom possession is or shall have been given by order of commissioners, may distrain upon any tenant to whom he may have demised such allotment, sue for any damage

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(a) 2 B. & Ald. 171.

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done to it, or bring ejectment for recovering the possession of it, although the award shall not have been executed. A mortgagor in possession is tenant to his mortgagee; the defendant, under the last-mentioned act, might, if his interest was unpaid, have ejected *Smith* the mortgagor; à fortiori the defendant, if he had himself been in possession, might have defended an ejectment against the mortgagor or a person claiming under him, and may do so now. Whatever effect the award might have, when executed, it would operate upon the defendant's title before that of the lessor of the plaintiff.

W. J. Alexander in reply. Sect. 46 of the local act vests only the lands "to be be allotted *and awarded*;" the mortgagor, therefore, had no legal estate to convey in the allotment now claimed, till the award was made. On the making of the award, that allotment vested in the lessor of the plaintiff, by sect. 46, and by the conveyance to him of the legal estate in the premises for which the allotment was substituted. [*Coleridge J.* Sect. 43 enacts that the lands to be allotted to vendees, as there directed, shall be held by them in the same manner as the vendors might have held them, "from and after the execution of the said award:" but by sect. 46 the allotments there mentioned are to be, remain, and enure as that section directs, "immediately after such allotments and exchanges are made."] The object in sect. 46 probably was to prevent difficulties which the commissioners might have had in ascertaining the rights of parties at the time of making the award, where those rights were not settled according to sect. 43. The recital in stat. 1 & 2 G. 4. c. 23. s. 1. favours the view taken by the lessor of the plaintiff.

Lord

LORD DENMAN C. J. The lessor of the plaintiff in this case makes title under a conveyance from *Jonah Smith* in 1824; the defendant says that at that time he was already entitled by a conveyance in 1818, and by the local act, 51 G. 3. c. xxv. One clause, sect. 46, of that act, directs that the lands to be allotted and exchanged shall, immediately after such allotments and exchanges are made, be, remain, and enure to the several persons to whom the same shall be respectively allotted or given in exchange, who shall from thenceforth stand and be seised and possessed thereof to such and the same uses, estates, trusts, and purposes, and subject to such and the same charges and incumbrances, as the lands in lieu of which such allotments or exchanged premises shall be respectively made or taken as aforesaid are now held under or subject to, or would have been held under or subject to if this act had not been made. The act passed in 1811; in 1812 this allotment was made to *Jonah Smith*; and in 1818 he conveyed to the defendant. The whole law of the case is contained in sect. 46 of the local act; it is not affected by the general act, 1 & 2 G. 4. c. 23. And I think that, under the local act, *Jonah Smith* had power to convey this allotment to the defendant. The defendant therefore has proved his title.

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PATERSON J. *Abbott C. J.* says, in *Farrer v. Billing* (a), "The language of the local act upon which that case" (*Kingsley v. Young* (b)) "arose was different from that of the act under our present consideration. The legislature may certainly, by proper words, give the seisin and legal estate upon the allotment only, and before

(a) 2 B. & Ald. 178.

(b) 17 Ves. 468. 18 Ves. 207.

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execution of the award. But we think the present act does not contain any words proper for that purpose, or indicative of such an intention." The forty-sixth section of the local act upon which this case turns does contain proper words for such a purpose, and indicative of such an intention. The words "so to be allotted and awarded" mean "to be allotted, and respecting which an award shall afterwards be made;" and then it is said that the premises to be allotted shall be, remain, and enure to the persons mentioned, "immediately after such allotments and exchanges are made as aforesaid;" that is, not when the allotments are marked out and completed by the award, but as soon as they are in fact made. If the enactment stopped at the words "be, remain, and enure to the several persons to whom the same shall be respectively allotted," no legal estate would pass by the allotment, under this clause; but it goes on to say, "who shall from thenceforth stand and be seised and possessed thereof to such and the same uses," &c. as the lands in lieu of which they are made. *Jonah Smith* was seised in fee of the property in lieu of which the land now in question was allotted. Immediately after the allotment he was seised in fee of that land, and he mortgaged it to the defendant in 1818. I do not rely upon stat 1 & 2 G. 4. c. 23., because that passed after the deed of 1818 was executed; but I found my opinion on sect. 46 of the local act. Under that section, *Smith* took a legal estate in the allotment made to him in 1812, which estate he conveyed in 1818; what happened afterwards is immaterial.

WILLIAMS J. I am of the same opinion. The case turns upon sect. 46 of the local act; and in that section the

the legislature clearly exercises the power of at once giving a vested legal estate in the allotments to be made.

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COLERIDGE J. This is a narrow question, on the construction of sect. 46 of the local act. It has been contended that the allotments spoken of in this section mean allotments perfected by execution of an award; but, without referring to cases, I think that, upon a mere view of the language employed in this and other sections of the act (where allotting is spoken of in a distinct sense from that of making an allotment complete by an award), the word "allotments," in sect 46, must clearly be taken in the popular acceptance. Then, in 1812, the commissioners had made an allotment; and *Jonah Smith* was put into possession, was seised in fee, and might mortgage to the defendant. The construction of the act being once settled, as we have decided it, *Doe dem. Sweeting v. Hellard (a)*, and other cases which have been cited, are as favourable to the defendant as they would have been to the plaintiff on a different interpretation.

Judgment for the defendant.

(a) 9 B. & C. 789.

1836.

Wednesday,
December 16th.

The KING *against* The Inhabitants of
BILLINGHAY.

On a case sent from sessions, it was stated :

That, on appeal against an order of removal, it appeared that the pauper was bound apprentice to a wheelwright, and served in the appellants parish under the indentures for twenty months; after which the pauper's father bought up the remainder of the time, and the indentures were cancelled, and the pauper afterwards let

ON appeal against an order of two justices, whereby *Robert Lynn* was removed from the parish of *Asterby*, in the parts of *Lindsey*, in *Lincolnshire*, to the parish of *Billinghay*, in the parts of *Kesteven*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case (a).

The pauper was bound apprentice, by indenture, for five years, to *Robert Lund* of *Billinghay*, wheelwright, and served him at *Billinghay* under the indenture for one year and eight months. The indentures were then cancelled, the pauper's father having bought up the remainder of the time. The pauper afterwards, having first gone upon liking, let himself under a written agreement to *Robert Medley*, of *North Ranceby*, wheelwright.

himself to another wheelwright, under a written agreement signed by the master, the pauper, and his father, — which was set out in the case, and by which the father, on behalf of the pauper, agreed that the pauper should serve the master in his business of a wheelwright, from 3d December 1827, to 3d March 1830, the master paying, at the expiration of the term, 5*l.* to the pauper, and in the meantime finding him meat, drink, and lodging; the father finding him clothes, washing, and all other necessities: — that the pauper stated that he served as an apprentice; that the respondents offered evidence of conversations between the parties, before and at the time of signing the instrument, and also of an indorsement thereon, which, however, was not proved to have been on the paper when the instrument was signed; that the sessions rejected the evidence in both instances, and confirmed the order; and that the order of sessions was to be quashed, or confirmed, according as this Court should, or should not, be of opinion that the agreement was one of hiring and service: Held,

1. That this Court was not concluded by the confirmation of the order at sessions.
2. That the agreement was one of hiring and service, and that the service must be understood to have been performed under the agreement.
3. That, as evidence, coming under the description of that which was stated to have been tendered, would in some cases be admissible, and in others not, it did not appear that the rejection was necessarily wrong.

This Court quashed the order.

(a) It was stated that the case was not drawn by counsel.

The

The agreement was signed by the pauper's father, *Robert Medley*, and the pauper, and was in the following words: — "Memorandum, that the undersigned *Robert Lynn* agrees, on behalf of his son *Robert Lynn*, that he shall serve *Robert Medley*, of *N.R.*, in his business of a wheelwright, from this time to 29th of *March*, 1830, the said *Robert Medley* paying, at the expiration of the said term, 5*l.* to the said *R. L.* the younger; *Robert Lynn* to find his son clothes, washing, and all other necessities; and *Robert Medley* meat, drink, and lodging." Dated 3d *December*, 1827. The pauper stated that he served as an apprentice (a).

The respondents proposed to give in evidence conversations between the parties before and at the time of signing the instrument; but the Court rejected the evidence. The respondents also proposed to give in evidence the indorsement on the paper within which the agreement was written; but, as it was not proved that the indorsement was on the paper at the time the agreement was signed, the Court rejected the evidence.

The order confirmed, subject to a case.

If the Court of King's Bench shall be of opinion that the agreement was an agreement of hiring and service, the order of sessions is to be quashed; otherwise, to be confirmed.

Whateley and *Whitehurst*, in support of the order of sessions. First, the contract set out was an imperfect contract of apprenticeship. The sessions must be considered to have so found: and the question was one of fact for them. It must be assumed that they believed

(a) It appears to have been assumed on the argument that the service was for a year, and was performed in *North Rauceby*.

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what the pauper said: and his service in the character of apprentice would be inconsistent with a hiring and service in the character of servant. The pauper had, in the first instance, commenced an apprenticeship: what was done afterwards was apparently for the purpose of enabling him to learn that which he would have learned under the original indentures, had they not been cancelled. At all events, the case shews that the pauper was settled at *Billinghay*, by the service with *Lund*, unless there was a subsequent settlement gained elsewhere. Now the only proof of service in *North Ranceby*, even if there be a contract of hiring, is of service in the character of apprentice. But, next, even if the sessions were wrong in assuming this to be an imperfect contract of apprenticeship, the order cannot be quashed, but the case must go back, on account of the rejection of the evidence. The conversation might have explained the transaction, so as to shew that the parties really contemplated teaching and learning. Having that view, they might have framed the contract as it now stands for the purpose of evading the stamp laws. Any thing not contradictory to the instrument, but explaining its effect by collateral matter, might be shewn by parol evidence; *Rex v. Laindon* (a), *Rex v. Highnam* (b), *Rex v. Northwingfield* (c), *Rex v. Llangunnor* (d), *Rex v. Cheadle* (e), *Rex v. Scammonden* (g). It is common to cross examine the subscribing witness to an instrument. If, upon any supposition, parol evidence was admissible, the rejection was wrong. Further, the respondents, when the written contract was produced,

(a) 8 T. R. 379.

(b) 1 Bott, p. 522. pl. 651. (6th ed.)

(c) 1 B. & Ad. 912.

(d) 2 B. & Ad. 616.

(e) 3 B. & Ad. 833.

(g) 3 T. R. 474.

had a *prima facie* right to require that all the writing which appeared upon it should be read: although, if it were proved that the indorsement was made at a time subsequent to that of the execution, such indorsement could not be evidence to vary the contract.

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G. T. White, *contra*, was stopped by the Court.

Lord DENMAN C. J. I cannot see any ground of doubt. We must deal with this case as we find it. The sessions have confirmed the order, subject to our view of the effect of a written document. Whether there be a hiring and service is of course a question of fact: but here it is a fact which depends upon the effect of an instrument in writing; and the sessions may ask for our opinion, whether such an instrument create a contract of hiring or not. I think this does create a contract of hiring; it contains no provision for learning or teaching. Then we cannot take upon ourselves to say that the sessions were certainly wrong in rejecting evidence of the conversation which took place at the time of the agreement. They do go into some matters besides the agreement; for they state a preceding agreement, and the pauper's own statement as to the character in which he served. The evidence of conversation may or may not be admissible according to its nature: but it is too much to say that all which took place at the time is necessarily evidence. If the conversation shewed a fraud, by a mis-statement of the contract in the instrument, it would be evidence. If it appeared that the evidence was tendered under such circumstances, we should have had to say, not what the effect of the contract is, but whether the evidence was properly rejected.

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But, as the case stands, we cannot assume circumstances shewing that the rejection was wrong. Nothing, therefore, is shewn to have been wrong, except the interpretation which the sessions put upon the contract.

PATTESON J. The sessions have determined the law and the fact. We, of course, do not decide on the fact; but we are to give our opinion on the instrument which the sessions have sent to us. Whether they were wrong or not in rejecting the evidence, we do not know: all that we know of the evidence offered is, that it consisted of conversations, of some kind, before and at the time of signing the instrument. Some conversations would be admissible: others would not: we can pay no attention to such a statement. As to the rejection of the indorsement, the sessions give their reason; the indorsement could have nothing to do with the instrument. Then we are to look at the instrument itself. On that I am clearly of opinion that the contract was one of hiring and service, and that the sessions were wrong in their construction of it.

WILLIAMS J. The sessions have left the effect of the contract to us. The rest of the circumstances are either not before us, or disposed of by the case. We cannot assume that the evidence offered by the respondents was such as ought to have been received: some evidence of this kind is so, and some is not. The origin of the cases in which parol evidence has been held admissible was *Rex v. Highnam (a)*, where the evidence shewed an attempt to evade the stamp. But here the case does not shew what the evidence was. I

(a) 1 *Bott*, p. 522. pl. 651. (6th ed.)

cannot admit that all questions may be put, on cross-examination, to a subscribing witness. As to the point which really is before us, I agree that this is a contract of hiring and service. The sessions have thought otherwise, and ask us whether they are right or wrong. I think they are wrong.

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COLERIDGE J. I am as adverse as any one can be to taking away questions of fact from the quarter sessions, or receiving such questions from them. But in cases where they act as judges, if they refer the points, on which they so act, to us, we cannot help reviewing their decision. Here is a written instrument, on which the sessions ask our opinion. It cannot be said that they have found the fact; they find it only on a particular view of the instrument. The question therefore comes before us, whether that view was right; and I think it was not right. It is argued that no service, in the character of servant, appears. That, however, is not so. If the pauper's assertion implies that, we must take the assertion together with the reason for it. He says that he served as apprentice. It does not follow that the sessions adopted his evidence. He did perform a service which, when the instrument is rightly interpreted, appears to be a service under a contract of hiring. As to the rejection of the evidence, I cannot agree that every indorsement, or all contemporaneous conversation, is admissible in evidence. In the cases cited, the parol evidence either explained the written instrument, or added independent facts, such as a consideration not apparent on the instrument, which was the case of *Rex v. Northwingfield* (a). So in

(a) 1 B. & Ad. 912.

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Rex v. Llangunnor (a) and *Rex v. Cheadle (b)* the evidence was not given by way of interpreting the terms of the contract, but to shew what the actual consideration was.

Order of sessions quashed.

(a) 2 B. & Ad. 616.

(b) 3 B. & Ad. 833.

Wednesday,
November 16th.

The KING against The Inhabitants of BOBBING.

Pauper, upon a vacancy of the offices of parish clerk and sexton of *B.*, was requested by the rector to perform the duty of clerk for a *Sunday*, which he did; and the rector afterwards said to him, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals."

Pauper accordingly entered upon the office. Soon afterwards, two parishioners objected to what the rector had done, who answered that he should persist. The pa-

perish were in the habit of paying a salary to the parish clerk and sexton; the overseer refusing to pay the pauper, the rector threatened him with legal proceedings, upon which the salary was paid, and the vestry afterwards increased it. Pauper executed the office, and received the emoluments, residing in *B.*, for several years: Held, that he was well appointed, and gained a settlement in *B.*

ON appeal against an order of two justices, whereby *Henry Smart* was removed from the parish of *Barming* to the parish of *Bobbing*, both in *Kent*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper, being settled in *Bobbing*, went, about *Michaelmas* 1797, to reside in *Barming*, and continued to reside there till removed by the present order. In 1811, the offices of parish clerk and sexton of *Barming* became vacant; and Mr. *Noble*, who was then rector of the parish, sent for the pauper on a *Sunday* in that year, and requested him to perform the duty of clerk for that day. The pauper did so; and Mr. *Noble*, on coming out of the desk, said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." The pauper thereupon, without any thing further being said or done, entered upon the execution of the duties of the said offices, and con-

tinued

tinued to perform all the duties, and to receive the emoluments, from thence until 1833. Soon after the pauper entered upon the offices, two of the principal inhabitants objected to what the rector had done, inasmuch as the pauper was not a settled parishioner of *Barming*, but the rector said the pauper was the fittest person he could find, and that he should therefore persist in what he had done.

A salary of one shilling per week was attached to the offices, and had been paid by the parish to the person who had previously filled them; and the pauper applied for this at the end of his first year. The overseer, to whom he applied, at first refused payment, assigning as a reason that the pauper was not settled in the parish: but, the rector having threatened to take legal proceedings against the parish officers, the salary was paid to the pauper by the overseer, and continued to be paid by the parish to him for four or five years without any objection on their part. At the end of that period, the pauper applied to the parish for an increase of salary; and, the subject having been taken into consideration at a vestry meeting, it was at such vestry meeting agreed to raise the salary to 1s. 6d. per week; and at this rate the pauper was paid during the remainder of the time he served.

The question for the opinion of this Court was, whether, under the above circumstances, the pauper gained a settlement in *Barming*.

D. Pollock in support of the order of sessions. If the pauper was properly appointed parish clerk, the order cannot be supported. In *Rex v. Stogursey* (a) the pauper held the office of parish clerk for eleven years;

(a) 1 B. & Ad. 795.

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The King
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ants of
Barming.

but,

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—
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but, as it did not appear how he came into office, and as the appointment appeared to be in the vicar, this Court held that there was not even a colourable appointment, so as to give a settlement under stat. 3 & 4 *W. & M.* c. 11. s. 6., assuming the office to be an annual one within that statute. Here, all that takes place is, that the rector declares his intention to appoint hereafter: the words "shall appoint" cannot constitute a positive act of appointment, especially without a formal notice to the parishioners. [*Patteson J.* Some parishioners understood it as an appointment, and remonstrated with the rector, who said he should persist. Then the parish pays the salary: and increases it. Can you say that there was not an appointment, and notice of it to the parish?]

Bodkin, against the order, referred to 3 *Burn's Ecc. Law*, 66. (a) *Parish Clerk*, 3., and to canon 91, there cited as follows: "No parish clerk upon any vacation shall be chosen within the city of *London* or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being: which choice shall be signified by the said minister, vicar, or parson, to the parishioners the next *Sunday* following in the time of divine service." And, as to the office of sexton, he referred to *Rex v. Liverpool* (b). He was then stopped by the Court.

LORD DENMAN C. J. *Gatton v. Milwich* (c) shews that the office of parish clerk gives a settlement: and that case has not been over-ruled. And this was a distinct appointment to the office.

(a) 8th ed.

(b) 3 *T. R.* 118.(c) 2 *Salk.* 536.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

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Orders quashed.

—
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against
The Inhabit-
ants of
HOLBEACH.

The KING *against* The Inhabitants of
HOLBEACH.

Wednesday,
November 16th.

ON appeal against an order of justices, whereby *George Hobson* was removed from the parish of *Holbeach*, in the parts of *Holland* in *Lincolnshire*, to the parish of *Spalding*, in the same parts and county, the sessions quashed the order, subject to the opinion of this Court on a case, the material parts of which were as follows:—

The grounds of removal, as set forth in the examination of the pauper, a copy of which was sent to the appellants with the order for his removal, pursuant to stat. 4 & 5 W. 4. c. 76. s. 79., were: That about three years ago he was hired by *John Boston*, of the said parish of *Spalding*, farmer, for one year, at 8l. 15s. wages, and served *J. B.* under that hiring the whole of the same year in *Spalding*. The notice of appeal stated the grounds thereof (pursuant to section 81 of the said act) as follows:— That, at the time of the pauper contracting to serve *J. Boston*, as mentioned in the copy of examination, and before the completion of their said bargain, and before any earnest money was paid, the pauper stipulated and agreed with *J. Boston* “ that he should, out of his year’s service, be allowed and have

A pauper being removed to a parish as settled there by hiring and service, the parish gave notice of appeal, stating, as the ground (pursuant to stat. 4 & 5 W. 4. c. 76. s. 81.), that the pauper, at his hiring, stipulated to have two days’ holidays as *Spalding* club feast in *July*; and that he had such holidays during his year of service. On the bearing of the appeal, the pauper (called for the respondents) proved on cross-examination that he, at his hiring, bargained for one day’s holiday to go to *Holbeach* fair, and had it during the year; but that he did not bargain for, or have, any holiday at *Spalding*

club feast. The sessions having found an exceptive hiring, subject to the opinion of this Court whether evidence as to the one day’s holiday was admissible,

Held, that, under the notice given, such evidence could not be received; and the order founded upon it was quashed.

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two days' holidays at *Spalding* club feast in the month of *July*; and that the said pauper *G. H.* was allowed and did take and absent himself from his said master's service during the said two days accordingly; whereby he did not gain any settlement in our said parish of *Spalding*." The pauper proved the hiring as above stated, and a service in *Spalding*; but, upon cross-examination for the appellants, he admitted that at the time of hiring he bargained for one day's holiday to go to *Holbeach* fair, and that he had such holiday in pursuance of the said bargain; but he denied that he made any bargain to have holidays at *Spalding* club feast; and in fact he had not any such holidays. The respondents contended that, as the holiday for *Holbeach* fair formed no part of the grounds of appeal, the appellants could not go into it. The sessions, however, being of opinion that it might be gone into, and that the hiring, as proved, was exceptive, quashed the order, subject to the opinion of this Court, whether, by sect. 81 of stat. 4 & 5 *W. 4. c. 76.*, and by the grounds of appeal as above set forth, they were precluded from receiving such evidence; if they were, their order was to be quashed.

Amos, in support of the order of sessions. It must be assumed that there was not, in the opinion of the sessions, any surprise upon the respondents. The sessions may have gone too far in their ruling; but, if they have been satisfied, on the circumstances as they appeared before them, that they ought to arrive at such a conclusion, the case is probably not one in which this Court will review their decision.

Lord

Lord DENMAN C. J. We must hold the parties strictly to their notice. If anything has been untruly stated by which the respondents may have been misled, the statute has not been complied with. The objection, having been taken, must prevail.

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against
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ants of
HOLBEACH.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Order of sessions quashed.

Whateley was to have argued against the order of sessions.

The KING against The Inhabitants of
KELVEDON.

Wednesday,
November 16th.

ON appeal against an order of justices removing *James Bird* from the parish of *Kelvedon* in *Essex* to the parish of *Colsterworth* in *Lincolnshire*, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper having, after *November* 1st, 1834, become chargeable to *Kelvedon*, an order of magistrates was obtained by the overseers of *Kelvedon* for his removal to *Colsterworth*; and, in compliance with stat. 4 & 5 *W. 4. c. 76. s. 79.*, notice in writing of the pauper being so

The parish officers of *K.*, intending to remove a pauper to *C.*, sent to the officers of the latter parish a notice of chargeability, the order of removal, and the pauper's examination. The examination stated that the pauper was born at *K.*, where his father then resided;

but that the father then, and until his death, belonged to *C.*, as the pauper had heard and believed; and that the pauper had heard him say that he was a certificated man from *C.* The officers of *C.* gave notice of appeal on the ground that the pauper's father never was settled in or certificated from *C.* On the hearing of the appeal, the respondents offered evidence that the pauper's father was settled in *C.* by apprenticeship.

Held that, under stat. 4 & 5 *W. 4. c. 76. s. 79.*, it was not necessary that more specific information should have been given of the grounds of removal, to render the above evidence admissible.

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—
The King
against
The Inhabit-
ants of
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chargeable, accompanied by a copy of the order of removal, and by a copy of the examination upon which such order had been made, was sent by the post by the overseers of *Kelvedon* to the overseers of *Colsterworth*. The examination was as follows:—

“*Essex*. The examination of *James Bird*, who saith,” &c., “I was born at *Kelvedon* in the said county, where my father then resided, but belonged to the parish of *Colsterworth* in *Lincolnshire*, and continued to belong there until his death as I have heard and believe; and I have also heard him say that he was a certificated man from the said parish of *Colsterworth*.” “That I have never done any act whereby to gain a settlement in my own right, to the best of my knowledge and belief:” &c.

(Signed)

“*James Bird*.”

The above documents were duly received by the overseers of *Colsterworth*, who gave notice of appeal to the overseers of *Kelvedon*, and sent with such notice a statement of the grounds of appeal, as directed by stat. 4 & 5 W. 4. c. 76. s. 81.; which statement was as follows:—That the father of *James Bird* never was legally settled in *Colsterworth*, nor was there ever a certificate granted by *Colsterworth* owning the said pauper's father to be legally settled there, as in the examination stated: And take notice that at the trial of the appeal we mean to avail ourselves of both or one of the said grounds in support of the said appeal.

The appeal came on for trial at the *Essex Easter* sessions, 1835; and the respondents proposed to prove a settlement gained by the pauper's father in *Colsterworth* by apprenticeship; but the appellants objected that the respondents could not, under the 81st section of the statute, give evidence of any other grounds of removal
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than those set forth in the order of removal and examination; and that the settlement of the pauper's father in *Colsterworth* by apprenticeship was not stated in either document, as a ground of removal. The court of quarter sessions, upon this, decided against receiving the evidence, and quashed the order of removal.

If this Court should be of opinion that the respondents were not at liberty to give such evidence, the order of sessions was to be confirmed; otherwise to be quashed, and the appeal sent back to be tried.

Sir *W. W. Follett* and *Ryland*, in support of the order of sessions. The question which the appellants came prepared to try was, whether or not the pauper's father resided in *Kelvedon* under a certificate from *Colsterworth*. The statement in the examination, that the father belonged to *Colsterworth*, and the denial, in the notice of appeal, that he was ever settled there, raise no specific question ulterior to that upon the certificate. The respondents could not, upon that statement and denial, consistently with stat. 4 & 5 *W. 4. c. 76.*, sects. 79 and 81 (proviso), go into evidence of a particular kind of settlement, not pointed out by the order of removal and the examination of the pauper. [Lord *Denman* C. J. What more do you say the respondents could have done for the information of the appellants? *Coleridge* J. The respondents send the pauper's examination, but they cannot alter its words. It is different with the appellants; they state the grounds of appeal in their own language.] The meaning of the enactment in sect. 79 is, that those who send an examination to parties whom they charge with a pauper should, on taking such examination, have put proper questions, and have obtained particular information of the settlement

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which the pauper claims. The late case of *Rex v. The Justices of Cornwall* (a), mentioned in *Archbold's Act for the Amendment of the Poor Laws*, &c. p. 124, not. (70), 4th ed., may seem to countenance a different practice; but the general mode of statement here insisted upon as sufficient would, if it prevailed, render sect. 79 comparatively useless. [Coleridge J. Suppose the pauper had merely said, in his examination, "my father was settled in *Colsterworth*;" do you say that no evidence of settlement could have been gone into?] It could not be said, in such a case, that there was an examination. A mere assertion of the pauper, not alleging any ground of knowledge, could not be noticed as a statement.

Knor (with whom was *Turner*) contra. The appellants, by sect. 81, are to state their grounds of appeal; but sect. 79 does not throw the same obligation upon the respondents, as to the grounds of removal. (He was then stopped by the Court.)

LORD DENMAN C. J. The provisions of the act might have been fuller, and might have imposed on the respondents the same duty, as to statement of grounds, which is cast upon the appellants. But this has not been done. The act, by sect. 79, requires only that the removing parish shall send to the parish receiving the pauper a notice of chargeability, with copies of the order of removal and the pauper's examination. If the examination has been properly taken, it will sufficiently shew the ground of removal. But this is not the statement of the respondents. The appellants are differently

(a) *Ante*, 134.

situated ; they know the grounds of their appeal, and can state them in their own manner. The objection here raised is a criticism on the sufficiency of the examination, not upon any thing in the conduct of the respondents. The order of sessions therefore is erroneous.

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PATTESON J. I am of the same opinion. And the appellants have treated these documents as conveying the requisite information.

WILLIAMS J. We have nothing to do with the question whether the examination was properly conducted or not. The provisions of the act have been so far complied with, that a copy of the examination has been sent, with the order of removal and notice of chargeability. Then the respondents offer particular evidence of that which is generally alleged in the examination, namely, that the pauper's father belonged to *Colsterworth*. I think they might give such evidence.

COLERIDGE J. There is a difference, purposely made, as I imagine, in the language of sects. 79 and 81, as to respondents and as to appellants. Care is taken to prevent appellants from being prejudiced for want of information, by the enactment, in sect. 79, that the pauper shall not be removed until twenty-one days after the notice, or, if there be an appeal, until such appeal shall have been heard, or the time for prosecuting it have expired ; and, further, by the provision of sect. 80, giving appellants access to the pauper for the purpose of examining him as to his settlement ; so that, if the statement furnished to them is too general, they may ascertain what is meant. They then draw up their notice, in

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their own language, with a full knowledge of the grounds they mean to rely upon, and may be expected to state them with particularity.

Order of sessions quashed. Case to be reheard.

Wednesday,
November 16th.

The KING against The Trustees of GREAT DOVER STREET ROAD.

Trustees were appointed under a local act for making a road, and they and their successors were empowered to purchase lands, which should be conveyed to and vest in them, and to lay such lands into the intended road, to take tolls thereon, and to apply the receipts towards paying the interest of a

ON appeal by the above trustees (*a*), at the *Surrey* sessions, *Easter*, 1893, against a certain rate for the relief of the poor of *St. Mary, Newington*, the sessions confirmed the rate, subject to the opinion of this Court on a special case, which was, in substance, as follows:—

The appellants were rated as the trustees under an act of parliament passed &c. (10 G. 4. c. cxiii., local and personal, public), for "Land upon which they have made a road, and in respect of which they receive tolls." By stat. 49 G. 3. c. clxxxvi. (local and personal, public),

sum advanced by certain shareholders, and to the putting the act in execution, and to the repayment of the principal advanced. By a subsequent act their powers were continued; and it was enacted that no person should be eligible as a trustee unless possessed of five shares in the capital stock raised for making the road, and a penalty of 100*l.* was imposed on any person acting without such qualification. The surplus of the tolls (after making certain other payments) was to be applied in paying the shareholders interest, and, ultimately, their principal; and the act was to expire when the principal and interest were paid off, or, if they were not sooner discharged, in thirty-one years.

Stat. 3 G. 4. c. 136. (the provisions of which, except where expressly altered or repealed, extend, by sect. 4, to all turnpike acts made or to be made) enacts, by sect. 65, that no person, acting as trustee of a turnpike road, shall receive any money to his use or benefit out of the tolls, under a penalty of 100*l.* Sect. 51 enacts, that no tolls to be taken by the trustees of any turnpike road, nor any person in respect thereof, shall be rated to the poor.

Held that, although the trustees of the above road were shareholders and owners of the soil as before stated, and notwithstanding the contradiction between the above clauses in the general and local acts (with other alleged inconsistencies), the road was turnpike within the provisions of the general act, and the trustees not liable, in respect of it, to a rate for "land upon which they had made a road, and in respect of which they received tolls."

(*a*) For some previous proceedings in this case, see *Rex v. The Justices of Surrey*, page 701. note (*a*), post.

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for making and maintaining a road from the borough of *Southwark* to the *Kent Road* in *Surrey*, after reciting that the making and maintaining of a commodious communication from near *St. George's* church in the Borough, to near the *Bricklayers' Arms* public house in the *Kent Road, Surrey*, would be attended with great advantage to the inhabitants of the Borough and places adjacent, and to the public in general, certain persons were appointed trustees to execute the act; and they and their successors were empowered to receive certain tolls, and were directed to apply the monies, received under the act, towards payment of the interest of a sum of money advanced by shareholders or subscribers for the purpose of carrying the act into execution, to the putting of the same in execution, and to the repayment of the principal sum advanced. Powers were also given them, for the purpose of making and improving the road, to treat for and purchase houses and land, and to cause the houses to be pulled down, and the ground whereon they stood, and the other ground, &c., so purchased, to be laid into the said road; and powers were given to the owners, &c., of lands or sites of houses, to convey them to the trustees and their successors, which conveyance should immediately vest the said lands, sites, &c., in the said trustees, &c. It was also enacted, that the trustees should annually pay to *St. Mary's, Newington*, the amount of rates payable, at the time of passing the act, in respect of the houses to be pulled down, such payments to cease when enough houses should have been built upon the road, and rated in the respondent parish, to make up an amount of rate equal to that imposed on the houses which should be pulled down. The act, and the tolls thereby granted, were to continue for twenty-

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one years. This act was amended by a statute, 51 G. 3. c. clxxv. (local and personal, public), not material to the case.

By statute 10 G. 4. c. cxiii. (local and personal, public), for continuing certain powers to the said trustees, after reciting the former acts, and reciting also that 34,648*l.* 12*s.* 4*d.* of the subscriptions made in pursuance of those acts had been expended for the purposes therein mentioned, but that the tolls received upon the said road had not been sufficient, after defraying the necessary charges and expences, to pay the subscribers in any instance more than 3*l.* 15*s.* per cent. interest, &c., so that the trustees had been unable to repay any principal, and that, for the purpose of enabling the trustees to continue paying interest or dividends, &c., it was necessary that the term formerly granted should be further continued, &c., and other powers granted, &c., the recited acts were repealed, and certain persons, some of whom were the then trustees under the former acts, and their successors, were appointed trustees for executing this act; but, by sect. 3, no person was to be eligible as such trustee unless (in addition to other property specified) he were possessed of or entitled to five shares at least in the capital stock raised for making the said road, and in actual receipt of the interest and dividends. A penalty of 100*l.* was imposed on any person acting as a trustee without being duly qualified.

The act also empowered the trustees to take certain tolls, but gave power to the quarter sessions to examine the accounts, and to order that the tolls should cease, if it should appear to them that the purposes of the act had been carried into effect: and (by sect. 48) the tolls were

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to be applied, first, in paying the expenses of obtaining the act, in continuing, supporting, &c., the toll-gates, bars, &c., and in paying the salaries of officers and servants; and then the trustees were empowered and directed out of the surplus to pay, until the sums subscribed for making the said road should be returned to the persons entitled thereto, 5*l.* per cent. interest per annum upon all principal sums subscribed; and they were then to apply the residue of the monies arising from the said tolls in repaying to the several subscribers the monies respectively subscribed or contributed towards making the said road, by virtue of the shares in the said road belonging to such subscribers respectively, and for no other use or purpose whatsoever. And it was enacted (by sect. 49) that, when and as often as the surplus of the tolls applicable to the repayment of any part of the said sum of 34,648*l.* 12*s.* 4*d.* should amount to 500*l.*, the trustees at their next meeting should decide by lot to which of the subscribers of and towards the said 34,648*l.* 12*s.* 4*d.* the shares to be paid off should belong; and (by sect. 86) that, so soon as the 34,648*l.* 12*s.* 4*d.* should be paid off, all the tolls should cease and the toll-gates, &c., be taken down and the materials sold, and the money applied to the purposes of the act, and from and immediately after such sale the powers granted should cease, and the act become void as if repealed: provided that, in case the said sum should not be wholly repaid, the act should continue in force for thirty-one years, and from thence until the end of the then next session of Parliament and no longer.

The trustees under stat. 49 G. 2. c. clxxxvi. obtained conveyances, and took possession, of land and buildings, made

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made the road, and erected toll bars; and they and the present trustees have received the tolls. Before the making of the rate in question, new houses were built along the line of road in place of those pulled down, paying rates to *St. Mary, Newington*, more than equal to those charged upon the former houses. The former trustees repaired the road; but, since the passing of a paving act, 11 G. 4. c. xlv. (local and personal, public), the necessary repairs have been done by the commissioners under that act, who have laid rates, in respect of such repairs, upon the inhabitants of *St. Mary Newington* occupying premises on the line of the road in question.

The total number of shares subscribed for is 492, of which the trustees hold 259. The entire amount of tolls ever received has not been sufficient, after deducting necessary expences, to pay off any part of the principal sum subscribed, or to keep down the interest at the rate of 5*l.* per cent., but the whole principal is now due, and there was due, at the end of 1832, 1598*l.* 16*s.* 1*d.* for arrears of interest at 5*l.* per cent. The case then stated the amount of the annual excess of receipts over the expenditure upon the road from *June* 1829 to *December* 1831; and the amount of interest or dividends retained by the trustees on their own shares in 1830 and 1831. By the rate in question the trustees were assessed upon the total profits for the year ending *December* 1831.

The grounds of appeal were: 1. That the trustees were not liable to be rated at all, not being the beneficial occupiers of any property within the parish. 2. That they were expressly exempted from rates by stat. 3 G. 4. c. 126., and particularly sects. 4 and 51, and
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by stat. 4 G. 4. c. 95., and, particularly, sect. 31 (a). Thirdly, that, if rateable, they ought to be rated only upon the average annual amount of interest retained by them in respect of their own shares.

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Thesiger and *Chambers*, in support of the order of sessions, contended, as to the first point, that the appellants were beneficial occupiers, according to *Rex v. The Hull Dock Company* (b), and *Rex v. Barnes* (c); and they distinguished the case from *Rex v. Liverpool* (d), and *Rex v. The Trustees of the River Weaver Navigation* (e), in which cases the persons charged as beneficial occupiers could not receive any profit. As to the second point, the intention of stats. 3 G. 4. c. 126. s. 51., and 4 G. 4. c. 95. s. 31., was to exempt the trustees of turnpike roads which were, properly speaking, public, not

(a) The General Turnpike Act, 3 G. 4. c. 126. s. 4., extends the provisions of that act to all acts then in force, or thereafter to be passed for making, &c., or maintaining "any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters and things as shall be expressly referred to, and varied, altered or repealed by any such act or acts as shall be hereafter passed."

Sect. 51. enacts, "that no tolls to be taken at any gate erected or to be erected by the trustees or commissioners of any turnpike road, nor toll house erected or to be erected for the purpose of collecting the same, nor any person in respect of such tolls or toll house, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial levy whatsoever."

Stat. 4 G. 4. c. 95. s. 31. enacts, "that no tolls or penalties for overweight to be taken at any house or weighing machine erected or to be erected, or adjoining to any turnpike road, nor any person whatsoever in respect of such tolls or penalties, or any house or building as aforesaid, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial rate or levy whatsoever."

(b) 5 M. & S. 394.

(c) 1 B. & Ad. 113.

(d) 7 B. & C. 61.

(e) 7 B. & C. 70. note (c).

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persons who receive the tolls for their own benefit, and are executing a private trust. The provisions of stat. 10 G. 4. c. cxiii., set out in the case, are in several instances irreconcilable with those of stat. 3 G. 4. c. 126. Thus sect. 61 of the latter act would make all the justices of the country joint trustees with the trustees of the road. Stat. 10 G. 4. c. cxiii. s. 3. fixes much lower qualifications as to landed and personal property, for a trustee, than those stated in 3 G. 4. c. 126. s. 62.; and it requires that every trustee shall hold five shares in the capital stock of the trust, under a penalty of 100*l*. if he act without that qualification; whereas stat. 3 G. 4. c. 126. s. 65. enacts that no person shall receive any money to his use or benefit out of the tolls, while acting as trustee, under a penalty of 100*l*.; yet the provisions of this latter act are not “expressly altered or repealed” by those of the local act. The only mode of reconciling this apparent inconsistency (and others which occur in the two acts) is to hold that a road under the circumstances stated in this case is not a turnpike road contemplated by the general act. The mere fact that power is given to form a road over certain land, and erect toll bars, does not make such a road turnpike, or a proper subject of that uniform management which it was intended, by stat. 3 G. 4. c. 126., to establish throughout the kingdom, and which must relate to public roads, properly so called. On a public turnpike road, as *Lawrence J.* says in *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal Navigation (a)*, “the tolls are paid for the benefit of the public, and not for

(a) 8 T. R. 350.

the use of any individuals." [Coleridge J. When a turnpike road is made with borrowed money, and the lenders receive interest out of the tolls, those tolls are paid for the benefit of individuals.] At all events, trustees and commissioners having themselves an interest in the road stand in a different situation. [Coleridge J. Does not a mortgagee, who has lent his money and taken the security of the road, stand in the same situation as a shareholder? Suppose he has taken possession of the toll houses.] A mortgagee of the tolls is owner of them, but not of the land and tolls as these trustees are. If indeed he takes the toll houses, he may be exempt from rate as to them, by the express words of stat. 3 G. 4. c. 126. s. 51. Trustees of a turnpike road generally have no beneficial interest. [Patterson J. Your argument would almost shew that sect. 51 was unnecessary. Coleridge J. How are the trustees in this case occupiers more than the trustees of an ordinary turnpike road?] If other trustees have the land vested in them they occupy, but not beneficially. All trustees would be rateable, if they occupied, and also derived a profit. Here they are, and are required to be, shareholders. (The argument on the third point is rendered immaterial by the decision on the second.)

D. Pollock, Barnwall, and Channell, contra, were not heard.

Lord DENMAN C. J. This case has been ingeniously argued; and extraordinary consequences may be shewn to result from the different provisions of the general and local

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local acts. But we cannot doubt that this is a turnpike road in the common sense and ordinary legal interpretation. And, if so, the enactment of 3 G. 4. c. 126. s. 51. is express, that no tolls to be taken at any gate erected by the trustees of any turnpike road, nor any person in respect of such tolls, shall be rated to the poor. If any difficulty had arisen as to the construction of this particular enactment, as compared with those of the other statutes, we might have been called upon to look into the question more minutely. But the difficulties suggested regard other provisions, into which we are not at present required to examine. The order of sessions must be quashed.

PATTESON J. I am of the same opinion. The whole question before us is, whether this be or be not a turnpike road. If it be, the provisions of the general act must be applied, as far as they can. Whether all the provisions of the general act could be enforced consistently with these local acts, we need not now enquire.

WILLIAMS J. concurred.

COLERIDGE J. I am of the same opinion. There has been much argument as to the situation of these appellants; other turnpike trustees, as it has been contended, exercising a mere trusteeship, whereas these have a beneficial occupation. But, if a mortgagee were to bring ejectment and take possession of the toll-house and tolls, it could not be said that he was not a beneficial occupier, and yet he would come within the direct

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words of the exempting clause, stat. 3 G. 4. c. 126. s. 51.

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Order of sessions quashed (a).

(a) The following decision took place on a preliminary point in this case.

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The KING against The Justices of SURREY.

Wednesday,
January 30th,
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A RULE was obtained this term, calling on the above justices to shew cause why a mandamus should not issue commanding them to enter continuances upon, and hear, the appeal of the trustees of the *Great Dover Street* road against a rate (the same which is mentioned in the above case). The circumstances were as follows.

At a meeting duly held, the trustees resolved to appeal against the rate, and in pursuance of that resolution *Charles Appleby Hopkins*, one of the trustees, acting (as their clerk now stated) for himself and the rest of the trustees, gave notice of appeal, beginning as follows:—"I *C. A. Hopkins*, one of the trustees acting under and by virtue of an act of parliament, &c., for and on behalf of myself and the others of the said trustees, do hereby give you and every of you notice that, at &c., an appeal will be entered and prosecuted *on behalf of the said trustees* against a certain rate, &c., and that the reasons and grounds of the said appeal are, that the said trustees are not liable," &c. He also entered into recognizance with two sureties, conditioned as follows:—"That *the said C. A. H. or the trustees* appointed under and by virtue of a certain act, &c., do appear at the next general quarter sessions" for the county of *Surrey*, on &c., "and then and there prosecute an appeal against a certain rate, &c., whereby the said trustees are rated and assessed in the sum of 1150*l.* in respect of land upon which the said trustees have made a road, and in respect of which tolls are payable, and that *he the said C. A. H., or the said trustees*, do abide the order thereon, and do pay such costs as shall be awarded by the justices," &c.

By a local act it was provided that, if any person should think himself aggrieved by certain assessments, he might appeal to the quarter sessions, first giving notice, and entering into recognizance to prosecute such appeal. By another act, giving powers to certain road-trustees, it was enacted, that they might sue and be sued in the name of any one or more of them; that no action or prosecution so commenced should abate by the death, &c.,

of such trustee; and that such trustee, in whose name any action or suit should be commenced or prosecuted in pursuance of the act, should be reimbursed his costs thereby incurred, and also the costs of prosecuting any indictment or other proceedings whatsoever, commenced or prosecuted against any person by order of the trustees.

A single trustee gave notice of appeal against a rate, beginning, "I, *A. B.*, one of the trustees &c., for and on behalf of myself and the others of the said trustees, hereby give you notice, that an appeal will be entered and prosecuted, *on behalf of the said trustees*, against a certain rate" &c. He also entered into a recognizance (in which no other trustee joined,) with the condition, "that *the said A. B., or the trustees* appointed under a certain act, &c., do appear at the next general quarter sessions, &c., and prosecute an appeal, &c., and abide the order," &c. It did not appear whether *A. B.* was or was not authorised by the trustees to take these steps, but they had made no disclaimer.

Held, that there was a sufficient notice and recognizance within the first-mentioned statute; and mandamus issued commanding the sessions to hear the appeal.

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By statute 54 G. 3. c. cxlii. (local and personal, public), repealing a former act relative to the poor rates of *St. Mary, Newington*, and granting other powers in lieu thereof, &c., it was enacted, in sect. 82, "That if any person or persons shall think himself, herself, or themselves aggrieved by any such rate," &c., he, she, or they may appeal to the next general or quarter sessions for *Surrey* which shall happen next after the expiration of fourteen days, &c., first giving ten days' notice, &c., and entering into a recognizance in 20*l.*, with two sufficient securities, conditioned for prosecuting such appeal, and to abide the order thereon, and to pay such costs, &c.

By statute 10 G. 4. c. cxlii. (mentioned in the case above reported) sect. 2, twenty-eight persons and their successors, being duly qualified, and to be elected as was after-mentioned, were appointed the trustees for putting the act in execution; and it was enacted that "all and every the powers, authorities, directions, matters, and things by this act given to or directed to be done by or before the said trustees, may be done and executed by or before any five or more of them," and shall be of the same force as if done by all. Sect. 5 enacted that the trustees should and might "*sue and be sued* in the name of any one or more of them;" that no action or prosecution to be brought or commenced by or against them, or any of them, by virtue of the act, in the name of any one or more of them, should abate or be discontinued by the death or removal of such trustee, or by any act of his without the consent of the said trustees, &c.; and that every such trustee in whose name any action or suit should be commenced, prosecuted, or defended in pursuance of the act, should be reimbursed out of the monies to be raised by virtue of the act, all costs to which he should be put by the event of such proceedings by reason of his being plaintiff or defendant, and also the costs of prosecuting any indictment or indictments, or other proceedings whatsoever, against any person whomsoever by the order of the trustees.

The appeal being called on at the sessions, the recognizance was objected to on the ground after stated; and the Court, thinking the objection valid, refused to proceed with the appeal.

Thesiger and *Tidd Pratt* now shewed cause. The condition of the recognizance is, that *Hopkins*, or the trustees, shall prosecute, and abide the order of sessions. The notice of appeal stated that the trustees would prosecute. *Hopkins* individually could not, for he was not a person thinking himself aggrieved, within the meaning of stat. 54 G. 3. c. cxlii. s. 82. [*Denman* C. J. The act does not require that he should be personally aggrieved.] There was nothing to shew that *Hopkins's* appeal was that of the trustees. If he, as an individual trustee, may prosecute an appeal, then each of the others may. If the grievance is that of the whole body of trustees, the respondents are entitled to such a recognizance as will bind the property of that body. The recognizance of this party cannot. Stat. 10 G. 4. c. cxlii. s. 5. enables the trustees to

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sue or be sued in the name of any one or more of them, and speaks of actions or prosecutions to be so brought or commenced; but there is nothing there that extends to an appeal against a rate. And the appellant does not shew any authority given him by the trustees to appeal or enter into recognizance. [*Denman C. J.* Have they disclaimed his act?] It was for him to shew that he was empowered. If the trustees are the appellant party, the notice should have been by them: but the notice is not given, nor the recognizance entered into, either by them, or by any apparent authority from them. The recognizance should have been absolute on the part of the trustees, and not in the alternative, as this is. [*Denman C. J.* *Hopkins* was a trustee; the recognizance at least bound him; he considered himself authorized to give it on behalf of the rest; and, whether he was so or not, they have not disclaimed what he did.]

D. Pollock, *contra*. The words of 10 G. 4. c. cxiii. s. 5. are quite sufficient to include "prosecuting" an appeal. [He was then stopped by the Court.]

DENMAN C. J. The Court are quite satisfied that this technical difficulty cannot prevail against the hearing of an appeal. The *mandamus* must go.

LITTLEDALE, *TAUNTON*, and *PATTESON J.*s. concurred.

Rule absolute.

DOE on the Demise of MUDD *against* SUCKERMORE.

Thursday,
November 17th.

EJECTMENT for messuages, &c., in *Suffolk*. On the trial before *Vaughan J.* at the *Suffolk Spring assizes*, 1835, a verdict was found for the defendant. In *Easter term* 1835, *Storks Serjt.* obtained a rule for a new trial on the ground of an improper rejection of evidence.

Defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that

the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shewn to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the bank of *England*, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court.

Per *Lord Denman C. J.* and *Williams J.* Such evidence was receivable.

Per *Patteson* and *Coleridge J.*s. It was not.

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On this day, cause was shewn by *Kelly* and *Gunning*; and *Storks* Serjt. and *Byles* were heard in support of the rule. The Court took time to consider; and, in *Trinity* term 1837 (*June* 8th), their Lordships, differing in opinion, delivered judgment seriatim. The facts, and the grounds of argument on each side, will sufficiently appear from the judgments delivered.

COLERIDGE J. This was a motion for a new trial, on the ground that evidence had been improperly rejected by my brother *Vaughan* under the following circumstances. The question in the cause was the due execution of a will; and the three attesting witnesses were called. It was supposed that one of them, *Stribling*, was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions (a) made by him in proceedings relating to the same will in another court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of pasteboard, were shewn to him; and he said he believed they were all of his handwriting. At the time he gave this evidence, another witness was in Court, and, the cause lasting to the second day, was called. He had never seen *Stribling* write, nor had any other means of acquiring a knowledge of the character of his handwriting, but from an examination of the signatures so produced: this he had made on the first day, and, from this, he stated that he thought he had

(a) These depositions were not read in the present cause.

acquired a knowledge of the character of his handwriting; and he was asked whether he believed the attestation to the will to be the handwriting of *Stribling*. This was objected to, and, on argument, determined to be inadmissible: in my opinion, after much consideration, the evidence was properly rejected.

The rule as to the proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus. Either the witness has seen the party write on some former occasion, or he has corresponded with him, and transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound, both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence;

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either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.

Upon these grounds directly, as I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison, by a witness, of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. It is familiar to lawyers that many attempts have been made to introduce this mode of proof, according to the practice of the civil and ecclesiastical laws; and a text writer, to whose opinions I shall always pay the greatest respect, Mr. *Starkie* I mean, has given this mode of proof the sanction of his authority, as preferable on principle to our own; 2 *Starkie on Evidence*, 375 (a). But, after some uncertainty of decision, the attempts have finally failed. *Rex v. Cator* (b), though a *Nisi Prius* decision, brings this matter very fully under review; and, to the extent at least of what it rejected, has always since been considered as laying down the rule correctly. In my humble judgment that ought not to be departed from. Assuming that no dispute exists as to the genuineness of the standard, or the fairness with which it has been selected, such a comparison leads to no inference as to the general character of the handwriting. The two specimens may be much alike, or very different; yet, in the former case, they may proceed from different hands, in the latter from the same. But, if the points which I have just supposed to be conceded, be brought into question, other and most serious objections arise to this mode of proof. If the *genuineness* be disputed, a colla-

(a) Ed. 2.

(b) 4 *Esp.* 117.

teral issue is raised, and that upon every paper used as a standard; an issue too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages, that the former standard is not produced, and that the opposing party can avail himself of no counter-proof. It is easy to see too, as has been well observed by Mr. *Starkie*, that this inquiry might lead to an endless series of issues each more unsatisfactory than the preceding. If the *fairness* with which the standard has been selected be disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice be given (and none is required by our law), and which must tend to distract the jury, if notice be given, and the discussion on the circumstances under which each specimen was written be fully gone into.

It must always be borne in mind, in considering the rule of the *English* law on this subject, that it has reference to a trial by jury; and that we have no provisions for limiting the standard of comparison, or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted. It will be found not at all irrelevant to the present inquiry to observe these provisions in the ecclesiastical and *French* laws; for they seem, not only to fortify the rule of our law, constituted as our mode of trial now is, but, by their apparent inadequacy in many supposable cases, and, in the case of the ecclesiastical law, by the alterations which it has been found expedient to introduce into the practice, to make us satisfied with its present constitution.

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From 1 Oughton's *Ordo Judiciorum*, tit. 225., *De Comparatione Literarum &c. ad probandum manum testatoris*, ss. 1, 2, 3, 10, 11., it appears that, when the handwriting of a testator or other principal party was disputed, and the attesting witnesses were deceased before the suit commenced, or were not called, it was allowable to proceed by the comparison of other instruments. These instruments of comparison were required to be proved *by witnesses who saw them written*(a); it was for the Judge to decide whether they were sufficiently proved; and then the comparison was made by sworn comparators whom he appointed, to the number of four or six *è senioribus procuratoribus, et peritioribus in arte scribendi*. The provision, that the witnesses must have seen the party write the documents which were to form the standard of comparison, would in our law make any comparison unnecessary; and the act of comparing here, as in the *French* law also will appear to be the case, was considered, not so much the function of a witness, as the exercise of skill in a particular art by ministers of the Court accredited by it, and, it should seem, in the absence of conflicting evidence, conclusively deciding the point in question. This mode of viewing the matter does indeed relieve it from some of the inconveniences above pointed out; but it is obviously inapplicable to the trial by jury: and, as the cause might turn entirely on the will or other instrument being signed by the testator or other party alleged, it in effect left its decision, not to the Judge, but to the delegated comparators who proceeded in his absence. Oughton's work was published in 1728, and, I apprehend, is considered to have

(a) Testes qui poterint deponere, quòd viderunt testatorem subscriptentem hujusmodi scriptis, &c. s. 3.

faithfully

faithfully represented the practice then prevailing. I have been at some pains to ascertain what the present practice is, and I find that that whole proceeding which *Oughton* describes has long been entirely obsolete. But that is not all. In 1813, a case of *Spear v. Bone* came before the delegates, between the next of kin and executors in a will. On the face of the will alterations appeared; and a third party, being the sole executor as it originally stood, intervened: and the allegation which he gave in raised the very question of comparison of handwriting; and the admission of this allegation was the matter in discussion before the delegates. I have been favoured by Dr. *Nicholl* with the printed papers of Dr. *Arnold*, one of the delegates, and his MS. note of the arguments. The Court, after a very learned argument and much discussion, directed the allegation to be reformed; and I am enabled to state that the reformation was settled with the full concurrence of the delegates. Dr. *Arnold's* paper book, which I have, contains the allegation as altered in his own handwriting. In 1816 the cause came on again; and the allegation stands reformed in the printed paper as settled in MS.; and that has ever since been considered the only proper form of pleading. The allegation originally alleged that, upon an accurate examination of the said will by *writing-engravers, and others, accustomed accurately to examine the formation of the letters of different handwriting, from their general occupation of making engravings of handwriting, facsimile, and otherwise, and otherwise best able to judge accurately thereof, it manifestly appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but that the same, though in many respects*

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very like the writing of the other parts of the will, bears the appearance of having been touched with the pen a second time, as if done by some one endeavouring to copy or imitate the handwriting of another person. It was thus reformed, — That, upon an examination of the said will, it appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but are in a feigned handwriting; and that the same is well known to persons skilled in handwriting.

From all this it appears that, although comparison of handwriting is still an admitted mode of proof in the ecclesiastical courts, yet they have found it expedient to contract rather than to enlarge the limits of its admissibility, bringing their rule more and more near to that which has hitherto prevailed in the courts of common law; a reason, as it seems to me, of no little weight against our admitting such a head of evidence into our practice.

The ecclesiastical law appears to have made no limitation as to the quality of the instruments which might be made the foundation of the comparison: "*alia scripta, quamvis omnino impertinentia ad causam institutam.*" (a)

The *French* law is more precise. It defines, not only the persons who are to make the comparison, sworn *experts*, three in number, appointed by the Court or agreed on by the parties, but the writings to be submitted to them. In the *Code de Procédure Civile*, Part. I. l. 2. tit. 10. s. 200., are found the provisions on this latter point. The writings must either be of a public nature,

(a) 1 *Oughton, Ord. Jud.* tit. 225. s. 3.

such as signatures made before a notary, or judge, &c., or papers written and signed in some public capacity; or, if private papers, they must be admitted in *the cause*, by the party to whom they are attributed, to be of his own handwriting: a previous admission of them, or previous proof, will not make them admissible. These latter restrictions are evidently framed at once to secure the genuineness of the specimens, and to meet the inconvenience of contradictory testimony as to this point; but they do not tend to the production of writing in the most natural character, and in a great many cases put it in the power of the party to exclude such from the comparison. *Pothier*, indeed, in his *Traité de la Procédure Civile*, Part. 1. c. 3. sect. 2. art. 1. §. 2. (a), seems to consider private writings or signatures as practically forming no standard of comparison on this last ground. It is obvious in how many cases it would be impossible to produce writings of an individual answering to the description here given of public writings.

I have been thus (I fear tediously) minute in stating the general rule, and the principles on which I conceive it now rests; and I think it unnecessary to cite any authorities in support of it, because no question is now made whether that rule exists, or is well founded; but it is contended that the facts of the present case fall within it. It is not denied that immediate comparison is inadmissible, or that the witness must speak from a knowledge of the general character of the handwriting; but it is asserted that here there was no such comparison; and the evidence tendered was founded on such knowledge. In order to determine this, it was necessary to

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have the rule, and the principle of the rule, distinctly in view; and it was desirable to see whether it rested on a sound foundation. Disregarding extreme cases, from which no inference can be safely drawn, and bearing in mind the mode of trial with reference to which it has been framed, I confess I have no desire to see the rule altered or narrowed; nor am I disposed to take any case out of it on account of a merely colourable difference in the facts, if they still remain within the principle.

Now, in the present case, it must be conceded that the witness had not acquired his knowledge of the character of the handwriting, whatever it was, in either of the ordinary modes. He had studied certain signatures selected by one party, and had acquired an impression of some general character pervading the whole: he had heard it proved that those were written by the witness *Stribling*; and, from these materials, he was to speak. It is asked, how does this differ from the case of knowledge acquired in the course of a correspondence, where the standard rests equally on the assumption that the letters are written by the party whose they purport to be? With respect to the *assumption*, there will be a fitter place to point out the distinction; but I answer, *here*, that the two cases differ in that which is *essential*, in the undesignedness of the one, the fact that the letters are written in the course of business, without reference to their serving as aids for a collateral purpose in some future unknown cause; and in the selection which is made in the other by the party to the cause, who seeks to produce them for a particular purpose. I have, therefore, no reasonable assurance that the witness has the materials for ascertaining the *general* character of the handwriting, which is the knowledge to be acquired:
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and the facts are in this respect similar in principle to those of *Stranger v. Searle* (a), where Lord *Kenyon* would not allow a witness to speak, from the knowledge which he had acquired even by seeing the party write several times previously to the trial, because it was done for the avowed purpose of shewing, as he alleged, his true manner of writing. Those were in truth selected specimens, though beyond all doubt genuine; but they could not be safely trusted to as giving the general character of the handwriting.

But this is not all. No fraud is imputed in the present case; but I cannot forget that we are called on to lay down a rule applicable to all civil and criminal cases; and I ought to be careful, therefore, that I do not so lay it down as to open a door to fraud of the most fatal kind. In the present instance, the writer himself admitted the signatures to be his; but that was only one mode of proof: it cannot be contended that the case would have been altered in principle, if a third person had proved them; or, if they had purported to be the signatures of the testator, or of the party in the cause, and so necessarily proved by witnesses other than the supposed writer. If such evidence be good for any, it is good for all, purposes; if it be receivable in confirmation of other testimony, it is receivable alone; if to disprove handwriting, it is equally so to prove it. And a conviction of forgery might pass on the opinion, which a single witness might form, founded solely on the examination of signatures, or a single signature, presented to him the night before by a prosecutor, who need not be called as a witness on the trial to explain when and where

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such specimen had been procured, or from how many selected, the prisoner, on the other hand, being wholly unprepared to enter into this explanation. It is no answer to this to say, that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once: that is an extreme case upon *a principle unobjectionable in itself*; for no one can deny that the seeing a party write is at least one correct mode of acquiring a knowledge of his handwriting. Here the *danger is in the principle itself*, that selected specimens may be made the standard from which the witness is to judge.

Furthermore, as the admissibility of this species of proof cannot depend on the fact of the signatures having been proved by the admission of the writer himself, I would ask, what course is to be pursued where the writing which is to form the standard, is itself disputed? Is the counter-evidence to be received at once as to this point; and the opinion of the jury to be taken on the preliminary and collateral issue, before the evidence is heard as to the principal document? Or is that to be gone into after the *primâ facie* proof on the collateral issue, and to be received, subject to being entirely displaced by the answer on the other side? Or, lastly, is the judge to decide this question of fact? I believe it is impossible to answer these questions without either introducing a most inconvenient novelty in our procedure at *Nisi Prius*, or involving the jury in a complication of issues from which it is too much to expect that they should escape safely.

Again, and connected with this last remark, I have always understood that papers cannot be submitted for the purpose of comparison, even to the jury, except they
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be evidence on the issue in course of trial before them. This was so decided by this Court in *Doe dem. Perry v. Newton* (a), in affirmance of some previous decisions. But, in the present case, the documents were not evidence in the principal cause; yet they must have been submitted to the jury, who, before they listened to the evidence of the witness as to the attestation to the will, must have been required to decide in their own minds the collateral issue raised on every signature, whether it were that of *Stribling* or not. It will be asked, whether, when the witness speaks from knowledge acquired in the course of correspondence, the jury must not also decide in their own minds whether the assumption be a just one, that the letters purporting to be written by the individual were in fact written by him. The answer is that, although, if it were shewn to the jury that the witness was mistaken in the supposition he had made, his evidence must undoubtedly fall to the ground, yet the law makes it, in the first instance, a presumption that the letters of a correspondence carried on in the ordinary course of business, where the acts done on the faith of it are ratified by the parties, are written or signed by those whose signatures they purport to bear. And this, in the absence of all design or selection, is a reasonable presumption. The whole, too, depends on the same witness; and no more embarrassment, therefore, is created to the jury than where the witness says he has seen the party write, in which case they must also determine whether they believe that preliminary statement, before they consider the weight of his evidence as to the particular document. This assumption, no

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doubt, may sometimes proceed on a mistake, but so may the most direct evidence on handwriting; there is nothing so difficult to put beyond question, as the fact that a particular instrument, which the witness has not seen to be signed, was signed by a particular person. In *Eagleton v. Kingston (a)* Lord *Eldon* states the rule of evidence as to handwriting, when he first came into *Westminster Hall*, with great minuteness, and limits it even more narrowly than my argument requires. But he mentions a remarkable instance, as regarded himself, of the uncertainty of testimony to this point. A deed was produced at a trial, on which much doubt was thrown, as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord *Eldon* himself; and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity; yet Lord *Eldon* had never attested a deed in his life.

In a matter so open to mistake and fraud, and where the consequences are so serious, I have no desire to widen the door of admission. Is there then any real distinction, either in principle or consequences, between the facts now before us and a direct comparison? If, instead of two days, the trial had lasted one; if, instead of an examination of the signatures on the first day, and out of Court, the witness had only seen them in Court, and immediately before he was shewn the will; would not this have been clearly a case of direct comparison, however the question had been framed or the answer worded? And can it be affirmed that the

(a) 8 Ves. 473.

alteration last stated would have in any respect differed the character of the evidence? Do they remove any one of the objections which have prevailed to exclude direct comparison from our rule of evidence?

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Upon the grounds, therefore, that our rule is a sound one, and well established, both in what it admits and what it rejects, sound in principle, and convenient with reference to the mode of trial to which it is to be applied, and that the present facts are substantially within the latter branch of it, I am of opinion that the learned judge rightly rejected the evidence tendered. I could have wished to examine in detail the decisions bearing upon the question, but the importance of the subject, and the difference of opinion which exists in the Court, have induced me (I hope excusably) to examine the principle so much in detail, that I must forbear; and I do so the more readily, because I have no doubt that that part of the argument will be thoroughly illustrated by another member of the Court. I will say this only, that I am not aware of any case, of now recognized authority, which lays down any *principle* conflicting with those on which I have relied.

I will only add, that I do not feel pressed by the case of ancient writings, in which a direct comparison is admitted. First, I observe that, if that proves anything, it proves *more* than is now contended for; for direct comparison of modern documents is not now insisted on. But, in truth, as to ancient documents, the necessity of the case, and the difference of circumstances, have introduced a different *rule of evidence*. You cannot call a witness who has seen the party write, or corresponded with him, nor is there much danger, in resorting to comparison, of an unfair selection of specimens. Further, it

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is obvious to remark that, in ancient documents, it does often become a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary.

With real diffidence, therefore, as to the soundness of my judgment, but having formed it with much consideration, I think this rule ought to be discharged.

WILLIAMS J. This was an action of ejectment, to try the validity of a will; and, upon the trial, one of the subscribing witnesses (*A.*) to the will was called, to prove the due execution by the testator, and his own attestation. The fact of his attestation being, on behalf of the lessor of the plaintiff, disputed, and, in consequence, the genuineness of his (*A.*'s) signature brought into question, he was asked, upon cross examination, whether certain signatures, to the number of twenty (then shewn to him), were of his (*A.*'s) handwriting; and they were by him stated so to be. The cause having been adjourned, these signatures were shewn to a second witness (*B.*) professing to have knowledge and skill in handwriting, who was directed carefully to examine the same; and, upon the day following, *B.* was called on behalf of the plaintiff, and was asked whether, from such examination, he had acquired a knowledge of the character of *A.*'s writing; and, in answer, he said he had. And, thereupon, the following question was proposed to him, whether, from the knowledge he had (so) acquired, he believed the signature of the attestation in question to be *A.*'s handwriting. Upon objection,

tion, the learned Judge considered the evidence to be inadmissible, and it was rejected accordingly. And, upon a motion for a new trial, the propriety of that decision is brought under our consideration.

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And the question (important as it is, being connected with principles and practice regulating the admissibility of evidence) seems mainly to be reduced to this point, whether the knowledge, which the witness professed to have, was acquired by means prohibited by any known and established rule of law. It is quite superfluous to remark that with the admissibility only is our concern. How far the evidence, if received, might have answered the intended object, or fallen short of it, with what observations it might, or ought to, have been accompanied, I think it wholly unnecessary to inquire.

Now, that proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear. From the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability upon which it is found to be unsafe to act, it may be, and constantly is, so submitted. From continued and habitual inspection, or correspondence, or both, carried on till the trial itself, down to a single instance, or knowledge twenty years old, evidence may be received: I allude, of course to the case of *Garrells v. Alexander* (a), where the execution of a bail bond was held by Lord *Kenyon* to furnish means of knowledge. The authority of this case is, indeed, questioned by Lord *Eldon*, upon another point, *because the witness would not go so far as to express any belief*; but, as to the competency of

(a) 4 *Exp.* 37.

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a witness founding himself upon a single instance (and *Burr v. Harper* (a) is to the same point), we have his (Lord *Eldon's*) important and prevailing *testimony*. In the case of *Eagleton v. Kingston* (b), he thus expresses himself as to what he considered the rule and course of proceeding in such cases. "You called a witness; and asked, whether he had ever seen the party write. If he said, he had, whether more or less frequently, *if ever*, that was enough to introduce the subsequent question, whether he believed the paper to be his handwriting. If he answered, that he believed it to be so, that was evidence to go to the jury." "You might call one, who had not seen him write for twenty years; and if he said, he believed it was the writing of the person, that evidence might go to the jury; but to be affected by all the rest of the evidence; *as it is the nature of all evidence to be more or less convincing.*"

The observations above applied to knowledge gained by seeing a party write must, I presume, be admitted to be applicable to knowledge gained from correspondence, "acted upon," as the phrase has been, or, in other words, where there has been something to shew that it was, really, the writing of the party, whose, on the face of the letter, it purports to be. Subject to the qualification of Lord *Eldon*, which seems to be the criterion and to decide the question in each case, I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief; what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce one to expect) in vain be looked for. To the jury it must go, in

(a) *Holt N. P. C.* 420.(b) 8 *Ves.* 473.

the language of Lord *Eldon*, from the highest to the lowest. That the evidence, therefore, ought to have been rejected from the slender and inefficient nature of it, would not be contended; indeed, the very objection implies the contrary. The question therefore comes, as I stated at the outset, to the means by which the knowledge of the witness was acquired. And the objection is twofold; first, that it was acquired merely by the comparison of writing; and next, that, at all events, it was not acquired by either of the legitimate and recognised modes, already referred to, having seen the party write, or corresponded with him.

As to the first, if the objection is to be understood in the sense in which it has been (2 *Stark on Ex.* 374. (a), *Roe dem. Brune v. Rawlings* (b), *Doe dem. Tilman v. Tarver* (c)), from the time of the reversal of *Algernon Sidney's* attainder (d), which recites that the jury were directed to believe a certain paper to be the prisoner's, *from comparing it with other writings of his*, it is to be observed that it does not apply. Whether what was

(a) Ed. 2. (b) 7 *East*, 282, note (a). (c) *R. & M.* 141.

(d) Stat. 1 *W. & M. sess. 1. c. 7.* (Private). The recital of this act is as follows: — "Whereas *Algernon Sidney*, Esq. in the term of *St. Michael*, in the thirty-fifth year of the reign of our late sovereign lord King *Charles the Second*, in the Court of King's Bench at *Westminster*, by means of an illegal return of jurors, and by denial of his lawful challenges to divers of them, for want of freehold, and without sufficient legal evidence of any treasons committed by him; there being at that time produced a paper found in the closet of the said *Algernon*, supposed to be his handwriting, which was not proved by the testimony of any one witness, to be written by him; but the jury was directed to believe it by comparing it with other writings of the said *Algernon*; besides that paper so produced, there was but one witness to prove any matter against the said *Algernon*; and by a partial and unjust construction of the statute, declaring what was his treason, was most unjustly and wrongfully convicted and attainted, and afterwards executed for his treason:" &c. 9 *Howell's St. Tr.* 996

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done be *equivalent*, is another question. The witness, not having before compared the disputed signature with those admitted, but having acquired *some* knowledge by an attentive examination of them (the admitted ones), is first called upon in Court to inspect the questionable signature, and give an opinion from such knowledge, and not from comparison by juxta-position of the signatures themselves. I beg to be understood as by no means intimating an opinion that the rule, which has obtained with respect to the comparison of handwriting, should be disturbed, *because*, upon examination, it may appear to depend upon reasons not perfectly satisfactory. It seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting, in the proper and ordinary sense of the term. To reject it, because what was *equivalent* to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding, in a great degree, all possibility of proof. What is to be said, where the means of knowledge are derived from a by-gone correspondence of considerable standing? What is it but comparing a distant, and (in proportion to the length of time) faint image in the mind with the writing in question? I will only refer to the observations of Mr. *Starkie* (a), in his learned and valuable work, and those of Mr. *Phillipps* (b) on the same subject. In a still earlier work, which the author used to say was more used by other writers than noticed, I mean a treatise

(a) 2 *Stark. Ev.* 375, 2d ed.(b) 1 *Phil. Ev.* 472. (6th ed.).

upon the law of evidence appended to his edition of *Pothier* by the late Sir *W. D. Evans*, I find the following remarks, with others to the like effect. "But where, in point of reason, is the objection to proof by comparison of hands, as founded upon an inspection at the trial?" . . . "What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison is made not with this imperfect and fallacious copy, but with an indisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may be naturally expected to afford" (a). I would repeat that I doubt the propriety (not to say the right) of this Court, upon plausible objections merely, to disturb long-established practice and usage, in a case, too, of such frequent occurrence; but, for the sake of the rule itself, and its security, I would confine it to the case of actual collation and comparison, which, when done in Court and before the jury, is supposed to be attended with inconvenience as to them ("unless a jury could read, they would be unable to judge of the supposed resemblance;" *Dallas C. J. in Burr v. Harper (b)*), which furnishes a reason against such comparison altogether.

The recency of the information and acquaintance acquired in this case can surely not operate as a valid

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(a) 2 *Evans's Pothier's Law of Obligations*, p. 185, Appendix, Numb. xvi. sec. 6.

(b) *Holt N. P. C.* 421.

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objection. Suppose a person to have seen another sign or write a paper, or to have received one or more letters from him, but, from length of time, his general recollection was become so faint and indistinct that he should be unable to form an opinion; might he not peruse and study those authentic documents, if in his possession, to improve and refresh his knowledge before he was called upon to give evidence respecting the writing of that person, by whom such paper or letters, as above supposed, were confessedly written? I apprehend he certainly might. Up to the extent of the above observations, if not beyond them, the very point has been decided in the case of *Burr v. Harper (a)*. In truth the reference was made, in that case, not to revive and refresh, but to *gain* knowledge. And would such perusal be admissible if made a week or a month before the trial, but not so if made an hour before the witness went into Court to give his opinion upon the particular writing in question?

The case of ancient documents, it must of course be admitted, depends upon a ground distinct from our present enquiry, necessity. Some considerations, however, not wholly foreign, perhaps, from our present subject, may be collected from that head of evidence. That an attentive observation of writing assumed to be that of a particular person, to constitute knowledge of his character, so as to enable a person to give evidence of opinion and belief, is allowable, must, I presume, be considered as placed beyond a doubt. In *Brookbard v. Woodley (b)*, *Yates J.* is said to have decided the contrary; but *Lord Hardwicke's (c)* authority is expressly in favour

(a) *Holt N. P. C.* 420.

(b) Note (a) to *Macferson v. Thoytes, Peake, N. P. C.* 20, 21.

(c) *Bull. N. P.* 236.

of it, and so are the more recent decisions, without exception. Whether, by studying the assumed handwriting, the witness should have acquired a knowledge of the handwriting, and, *then*, apply himself to the writing to be proved, or whether an actual comparison may be made, and so a foundation of knowledge laid, does not seem equally clear. *Holroyd J.*, than whom a more sound and safe authority cannot be quoted, was of the former opinion; *Sparrow v. Farrant (a)*; the latter course was pursued by Lord *Tenterden* in *Doe dem. Tilman v. Tarver (b)*, who at the same time quoted a case before *Lawrence J.* to the same effect. But, whichever course be the correct one, I apprehend it to be clear that no objection can be made from the time at which the information is obtained, upon which the proof is given. In the two last cited cases, it is obvious that the witness was called upon to pronounce an opinion in the midst of the trial, without any preparation before.

I come now to consider, whether the witness in this case had *any* legitimate means of knowledge to authorise the question, the answer to which was rejected.

It has been said that the specimens selected may have been garbled and fallacious, “calculated to serve the purpose of the party producing them, and, therefore, not exhibiting a fair specimen of the general character of the handwriting.” And this, it will be recollected, is the second usual objection to the admissibility of the comparison of handwriting (*Dallas C. J.* in *Burr v. Harper (c)*), the first having been before noticed. I have before endeavoured to explain why, in my opinion, the objection arising from such comparison was not applicable,

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(a) Note (x) in 2 *Stark. Ev.* 375. (2d ed.)

(b) *Ib.* and *R. & M.* 141.

(c) *Holt N. P. C.* 421.

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in fact, to this case. Supposing, however, for the present purpose, that it is, I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then *some* proof that they were of the witness's handwriting? And, if so, how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters, written, the one ten, the other five, years before? Why may the witness give an opinion of any person's handwriting from a study of such letters? Because the writer has, in some manner, authenticated them to be his. Why might the witness have been asked the proposed question in this instance? Because the witness had sworn that the papers were of his handwriting. In each case, it is from the *perusal* of papers (and *perusal only*) that the knowledge is acquired. In each case there is *some* proof that the papers to be perused, in order to form a judgment, are those of the parties respectively, respecting whose handwriting in the particular case the question and enquiry arise. To which of the two species of proof preference should be given, is a matter upon which opinions may vary, and foreign to the present purpose. The only question, as it seems to me, is, whether in both cases there is not *some*.

When speaking of the facts necessary to introduce knowledge of handwriting, not from actual inspection
but

but from correspondence, I adverted to an expression in frequent use, and which indeed has almost grown into the currency of a proverb upon this subject, that the letter or letters "*must have been acted upon.*" If, however, by this expression, it be meant to imply that any business must be transacted, or, in any sense of the word, *act done*, the observation is without foundation, for nothing of the sort is necessary. This was expressly decided by *Holroyd J.*, to the value and weight of whose opinion I have given my unnecessary, though sincere testimonial. Any thing, I presume, from which the identity of the writer is established, may suffice. If then, from such proof, whence a reasonable inference may arise that the letter or signature is by such or such person, an opinion of his handwriting may be given, the question recurs, whether there be not *some* foundation for opinion, where the party has upon his oath declared that the papers perused by the witness were written by himself. That no person has, hitherto, been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write, or received writing from him), may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, *has* it ever arisen before? If not, we are called upon, as in the various and ever varying combinations of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies having the nearest and most direct affinity to the subject, to this fresh question.

It is hardly necessary for me to observe that the view which I have taken of this case secures me from touching,

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ing, at all, upon the authority of the recent decision of this Court in *Doe dem. Perry v. Newton* (a), and of the Exchequer in *Griffith v. Williams* (b). I quite accede to the propriety of rejecting the evidence tendered in the former case, and of the line of distinction established in the latter. It is still less necessary, after what has been observed, — but, at the hazard of repetition, I am desirous to avoid the possibility of all misconception, — to say that I have, throughout, assumed the rule with respect to the comparison of handwriting to be perfectly fixed and established. Whether, after all that has been said and written against the comparison of handwriting, opinion and belief are not *virtually* formed, in a great variety of instances, upon comparison, and that not of the most satisfactory kind, is another question. The rule I find absolutely settled; and that is enough for me. If by argument, or upon further consideration, I could have been satisfied that the rule would have been infringed upon by the admission of this evidence, my task would have been easy, and a conclusion speedily arrived at. It is precisely because, as it seems to me, the admission of this evidence would have been according to and in pursuance of the rule, I think the rejection improper.

Whether the objection was worth the making, when the value of the evidence is considered, I will not undertake to say; but the question has arisen and must be disposed of. If it should be thought so, this only resembles another instance, not unconnected with it (*Goodtitle dem. Revett v. Braham* (c), *Carey v. Pitt* (d),

(a) *Ante*, 514. 1 *Nev. & P.* 1.(b) 1 *C. & J.* 47.(c) 4 *T. R.* 497.(d) *Peake, Add. Ca.* 130

Rex v. Cator (a), *Gurney v. Langlands* (b), the opinion of an *expert* upon the genuineness of handwriting; where the difference of opinion upon the admissibility of the evidence has been much greater than the importance, which, by universal consent, ought to be attributed to it if received.

That the present case is, in its precise circumstances, new, must, I presume, be admitted. Such an occurrence, however, must perhaps, from the nature of things, be deemed unavoidable. The saying of Lord *Mansfield* (c), when pressed by some citations from them, that he did not now sit to receive rules of evidence from *Siderfin* and *Keble*, may possibly be considered as rather bold; but I have no doubt that it was a true one of Lord *Kenyon*, in deciding a fresh point of evidence, *Keeling v. Ball* (d), that it is "the business of courts of justice to apply the general principles of the law to new cases as they arise."

Upon the whole, with sincere respect for the contrary opinions, I think the evidence was improperly rejected, and that there ought to be a new trial.

PATTESON J. In this case, one of the attesting witnesses to a will having been called, and having sworn to the publication and his own signature, twenty documents were put into his hand, in cross examination, all of which he swore to have his signature. None of these documents were used as evidence in the cause, nor could have been, unless with reference to the handwriting of this witness, or, as regards two of them, for the purpose of contradiction, those being the witness's depositions in

(a) 4 *Esp.* 117.

(b) In *Lowe v. Jolliffe*, 1 *W. Bl.* 366.

(c) 5 *B. & Ald.* 330.

(d) *Peake, Add. Ca.* 89.

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the Ecclesiastical Court. The twenty documents had been previously shown to an inspector from the Bank of *England*, and, after the examination of the witness, were again submitted to the same person. The cause was not concluded on that day; and, the next day, the inspector was placed in the witness-box for the purpose of swearing to his belief that the signature as attesting witness to the will was not the handwriting of the witness who had been examined the day before. He was asked how he had acquired a knowledge of the handwriting of the witness, when he stated it to be in the manner above mentioned, and none other. The learned Judge rejected his testimony; and the question is whether he was right in so doing.

All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; *Garrells v. Alexander (a)*, *Powell v. Ford (b)*, *Lewis v. Sapio (c)*; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of

(a) 4 *Esp.* 37.(b) 2 *Stark. N. P. C.* 164.(c) *M. & M.* 39.

the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party (*Lord Ferrers v. Shirley* (a), *Buller's Nisi Prius*, 236, *Carey v. Pitt* (b), *Tharpe v. Gisburne* (c), *Harrington v. Fry* (d)), evidence of the identity of the party being of course added aliunde, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to discover, in our law been considered sufficient to entitle a witness to speak as to his belief, in a question of handwriting. In both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.

A third mode is now sought to be introduced, namely, by satisfying the witness by some information or evidence that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix

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(a) *Fitzg.* 195.(b) *Peake, Add. Ca.* 130.

(c) 2 C. & P. 21.

(d) *R. & M.* 90.

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an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it, or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards shewing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to *the jury* that the former are the handwriting of the party, which perhaps may be considered as the same process in effect, expressed in other words.

The very foundation of this mode is the establishment of the fact that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.

Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord *Kenyon* in *Stranger v. Searle* (a); and, if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and, if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely, by a direct communication with the party.

The other mode of satisfying the witness, viz. by the information of third persons, is equally open to objection,

(a) 1 *Exp.* 14.

as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair.

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The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues, foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way from other papers, which would equally require to be proved; and so it is obvious that the same process, as is now attempted, might be repeated *ad infinitum*, and lead to no conclusion. But, if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes which I consider to be the only legitimate modes, those witnesses must, from the nature of their evidence, be much more competent to form an opinion as to the handwriting in question in the cause, than the witness whose evidence is proposed to be introduced by such a process. And, after all, when that evidence is introduced, what is it but a comparison of handwriting?

Now a direct comparison of handwriting *by a witness* has been, with the exception of one or two supposed cases, uniformly rejected; and it is only in very recent times that *a jury* has been allowed to institute such a direct comparison; and even that has been confined to a
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comparison between documents proved and given in evidence in the cause, being relevant to the issues raised on the record, and which being before the jury, it is hardly possible to prevent a comparison being instituted ; *Griffith v. Williams* (a), *Solita v. Yarrow* (b), *Rex v. Morgan* (c), *Allport v. Meek* (d), *Bromage v. Rice* (e). One authority to the contrary is to be found in *Allesbrook v. Roach* (g). But this Court recently, in the case of *Doe dem. Perry v. Newton* (h), has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial, in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so.

I know that it is thought by many persons that direct comparison of handwriting is more satisfactory than I am disposed to consider it. In a work of great merit, *Starkie on Ev.* vol. ii. p. 375. (i), there is this passage : "It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention." I agree to that passage in its very words : there the weakest possible degree of knowledge which can arise from seeing a person write is contrasted with

(a) 1 C. & J. 47.

(b) 1 Moo. & Rob. 133.

(c) Note to *Solita v. Yarrow*, 1 Moo. & Rob. 134.

(d) 4 Car. & P. 267.

(e) 7 C. & P. 548.

(g) 1 Esp. 351.

(h) Anté, 514. 1 Nev. & P. 1.

(i) Ed. 2.

the strongest possible degree which can arise from a direct comparison; and it is assumed that the specimens are fair and satisfactorily proved, which, I will venture to say, they will not be in one case in a hundred. But, generally, I am of opinion that the comparison, even of an admitted fair specimen with a disputed writing, is far from satisfactory. Nothing can be more fanciful than the opinions persons are apt to form from such comparison; some dwelling on the general character, some on the peculiar turn of a particular letter, and other minute circumstances of similitude or discrepancy, which every man in his own experience must know may arise from the different pen or ink, or haste, or deliberation, with which the same person writes at different times. To my mind, I confess, the knowledge of the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by one side or the other with a particular object.

I find no express authority that direct comparison of handwriting is admissible in evidence, but many to the contrary. It is indeed said, by *Pemberton* Serjt., in *The Trial of the Seven Bishops* (a), that "in every petty cause, where it depends upon the comparison of hands, they use to bring some of the party's handwriting which may be sworn to, to be the party's own hand, and then it is to be compared in Court with what is endeavoured to be proved, and upon comparing them together in court, the jury may look upon it, and see if it be right;" and he

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(a) 12 *How. St. Tr.* 297.

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was arguing against any such comparison in a criminal case. If such was the practice, it has long ceased to be so; and the distinction between civil and criminal cases, as to rules of evidence, is no longer recognised. However; on looking to the report of the *Seven Bishops'* case, it is plain that no question of direct comparison arose: the question really was, whether witnesses, who had never seen the parties write, but had seen writings supposed to be theirs, were admissible. The Court constantly said that they were not, and compelled the crown to prove the writing by other evidence; and, accordingly, an admission by all the defendants of their signatures to the alleged libel was proved. So, in *The Trial of Algernon Sidney (a)*, no evidence of direct comparison of handwriting was given; and some of the witnesses swore that they had seen him write (b). Yet, in the bill for reversing his attainder, it is stated that he was convicted by illegal evidence of comparison, which, so far as it goes, shews that such comparison was not at that time considered to be legitimate evidence.

Comparison of handwriting has, indeed, been allowed in the proof of very ancient documents, where, from lapse of time, no living person could have any knowledge of the handwriting from his own observation; as in *Roe dem. Brune v. Rawlings (c)*, *Morewood v. Wood (d)*, *Taylor v. Cook (e)*, *Doe dem. Tilman v. Tarver (g)*. But this has been allowed from absolute necessity, and the impossibility of better evidence being adduced. Direct comparison by a witness was expressly rejected by Lord Kenyon in *Stranger v. Searle (h)*, and by Lord Tenterden

(a) 9 How. St. Tr. 818.

(b) Page 854.

(c) 7 East, 282, note (a).

(d) Note (a) to *Doe lease of Didbury v. Thomas*, 14 East, 327.

(e) 8 Price, 650.

(g) R. & M. 141. (h) 1 Esp. 14.

in *Clermont v. Tullidge* (a); and it was conceded in argument at the bar, in the present case, that the uniform practice in the Courts for many years has been not to receive such evidence. In the case of *Burr v. Harper* (b) Lord Chief Justice *Dallas* allowed what I consider to have been comparison of handwriting; and I do not think that decision right: it was never brought under review, because the verdict was against the party in whose favour it was made.

I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested, and, for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned Judge was right in rejecting the evidence.

Lord DENMAN C. J. A person, whose name appears as an attesting witness to a will, is called by the defendant at the trial, and swears that he attested the will and saw the testator execute. The plaintiff's case is that the will was not genuine, imputing fraud, if not conspiracy, to some of the parties concerned. To this attesting witness he professes not to impute perjury, nor participation in the fraud: his theory is, that the witness attested some paper, and believes the will produced to have been that paper; but the defendant says that the witness was herein deceived, that the paper which he signed was not the will, though he thought so; and that the will, produced with his name, was never seen by him before. In connection with other facts,

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(a) 4 C. & P. 1.

(b) *Holt, N. P. C.* 420.

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from which he draws this inference, he proves by the same witness many of the genuine signatures of that witness, and then calls a second witness, who, obtaining from these an acquaintance with the character of the attesting witness's handwriting, is to be called upon afterwards to pronounce an opinion, whether the attestation to the will is in the same person's handwriting. That is, he is expected to give in substance the following testimony: — "I have gained a knowledge of the handwriting of A. from examining all the proved signatures, and I am of opinion that the signature to the will is not of the same character of handwriting;" from which, among other things, the jury were required to conclude that the will was not in fact attested by A.

The effect of this evidence is not under consideration. When the witness, with unimpeached character and unimpaired intellect, came to swear positively to facts on which mistake was scarcely possible, and to that handwriting with which no living person could be so conversant as himself, one can hardly imagine any position of the cause in which any matter of opinion could afford a formidable contradiction to his direct proof. In the present case, however, such a state of things doubtless existed; for the learned and able counsel for the defendant took the objection; and we are bound to consider whether, as a matter of strict law, the plaintiff had a right to lay before the jury the evidence that was withheld from them.

In the first place, I think it was not contended at the bar that evidence of opinion on this subject was not receivable, though in opposition to a positive statement of fact. And, indeed, however specious at first sight, such an argument could not be maintained a moment.

There

There is nothing binding in the most positive assertions of the most knowing witness: they may be untrue from intention or mistake; and, if untrue, the party interested should be allowed to offer evidence that they are so, which may consist of a variety of circumstances, including the character of handwriting. Suppose, *exempli gratia*, a man to have sworn that he saw a party sign and execute a bond; the evidence of all who were best acquainted with that party's writing, that the signature was not, in their opinion, his, would surely be admissible.

Taking it, then, as clear that the undeniable peculiarities of this case do not preclude evidence of opinion as to the handwriting, the only question is, whether the witness called to pronounce one had sufficient materials for forming one, to be admissible for that purpose. And he appears to stand in exactly the same situation as he would have done, if called to speak of the handwriting of a party to the suit, whether for or against the genuineness of the document. He may have been called for the plaintiff to prove the defendant's signature to a bill or bond. He did not see him sign it; nor has he ever seen him write: but this is confessedly immaterial, if he has had other adequate means of obtaining a knowledge of his hand, 2 *Starkie on Ev.* 372. (a). Such is the rule, as Mr. *Starkie* understands it, not in terms warranted by the page of *Buller's N. P.* (b) cited in his note, but fairly resulting from the practice.

Within what narrower limits can the line be drawn? The letters forming one side of a correspondence do not prove the handwriting, because addressed to a particular

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(a) Ed. 2.
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(b) *Bul. N. P.* 236.

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person: that person's evidence may be requisite to show that *A.* had in some way recognised the letters bearing *A.*'s signature, and was, therefore, probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, whether they proceeded from *A.* or any other. The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me.

In a *Nisi Prius* case, *Smith v. Sainsbury (a)*, it was necessary to prove the handwriting of an attesting witness. The defendant's attorney was sworn, and said that he believed he knew the handwriting, for he had seen the same signature to an affidavit used by the plaintiff's counsel at an earlier stage of the cause. *Park J.* overruled an objection to the evidence, observing, "If it was a mere comparison of handwriting, it would not do. But it is not so, the witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief. I have no doubt that it is evidence."

In ancient documents, knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign; and a witness, speaking from that knowledge, may give an opinion whether any particular writing was made by the same person. The process is

(a) 5 C. & P. 196.

therefore

therefore recognised as one which may enable one man to form a competent opinion as to the writing of another.

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against
Successors.

Pausing here for a moment, I must fairly say that I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The opinion tendered here was founded on such knowledge. If, however, any rule excluding such evidence had been promulged by competent authority, I should at once have yielded my own views. I find no such rule laid down; nor can I deduce one from the mere circumstance that opinion of handwriting has hitherto been formed on other means of forming one. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Suppose, for example, that, instead of Lord *Eldon* (a), some person of very inferior rank had appeared to be the attesting witness; that he was dead at the time of the trial; that conspirators, who forged the deed, had been entirely unacquainted with his mode of writing. The production of the instrument, and a perjured oath that he in fact attested, would set up the forgery: a clear knowledge of the character of this man's writing would at once defeat the fraud. But the means of obtaining such knowledge might be unattainable from any one who had either seen him write, or held any correspondence with him. From documents satisfactorily proved to have been written by the witness, possibly never heard of till the eve of the trial, complete demonstration might be obtained. Similar evidence, proving the genuineness of a disputed attestation, might save the

(a) See *Eagleton v. Kingston*, 8 Ves. 476; ante, p. 716.

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Not det.
Memo
against
Securities.

life of a person accused of forgery. I adopt, therefore, the rule in *Mr. Starkie's* work, which I think as important as it is intelligible.

No single authority cited in opposition to the rule, was applicable to this point, or rather was favourable to the defendant's argument. *Lord Ferrers v. Shirley (a)*, if it proves any thing, is against him; for there the Court would have received evidence of a witness's opinion on the handwriting to an attestation, if the papers on which the opinion was founded had been traced to the attesting witness. It was the proof of identity that failed. *Stranger v. Searle (b)* was before Lord *Kenyon* in 1793. The defence, to an action brought on the acceptance of a bill, was forgery of the supposed acceptor's name. The usual evidence of belief having been given by the plaintiff, the defendant produced other writings as his, for the purpose of comparing them with the bill sued on. The objection here taken was a preliminary one, that "it did not appear which was the real handwriting of the defendant, those bills, or those upon which the action was brought, both being proved by witnesses; and that it was besides, judging from a comparison of hands." The reporter says, "Lord *Kenyon* ruled, that the witness should not be allowed to decide on such comparison of hands." This ruling appears correct on both grounds; but it does not touch our present argument. For here the other documents were proved genuine by the witness himself; and the inference was not sought to be drawn from comparing the papers, but from enabling another witness to obtain a knowledge of the handwriting from the papers so proved, and then apply it to the paper in dispute.

(a) *Fitzg.* 195.(b) 1 *Esp.* 14.

There was however, in that case, a direct tender of evidence of opinion so formed; for the defendant's counsel then observed that the witness had seen the defendant write several times; but, on his adding that this was when the defendant had written his name for the purpose of showing to the witness his manner of writing, Lord *Kenyon* rejected the evidence, "as the defendant might write differently from his common mode of writing his name, through design." This objection scarcely required the acuteness of that great judge; but is quite foreign to the present discussion.

In *Allesbrook v. Roach* (a) a similar defence was made. After the usual evidence of belief, and apparently for the purpose of strengthening it, "another witness was called, who had in his possession five bills of the defendant's, which had been proved under his commission, he having been a bankrupt. Upon being shown the bill upon which the action was brought, he said he did not think the acceptance was the defendant's handwriting." This appears precisely similar to the evidence rejected in the present instance. The reporter adds, "upon comparing these bills with the acceptance of the bill in question, they were evidently dissimilar." He does not say by whom the comparison was made; we must take this (I think) to have been done by consent. Then, on the defendant's part, a witness, who had seen defendant write, declared his belief that the acceptance was not his writing. Then the counsel offered to the jury several other bills, admitted to be of the defendant's writing, and desired the jury to compare them; a course which was objected to, but allowed

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Mudd
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Suckermore.

(d) 1 Esp. 351. See, as to this case, *Doe dem. Perry v. Newton*, ante, pp. 517, 518.

by

1836.

Don dem.
Mund
against
SUGHAMORE.

by Lord *Kenyon*. This case surely does not assist the plaintiff's objection here, since the course there passed unquestioned which was here declared inadmissible: and the opinion of the learned Judge, that the jury might compare writings, does not make out that he would have excluded opinion founded on other documents proved aliundè to be genuine.

The next case in order of time, which never fails to be mentioned when evidence of handwriting is debated, *Goodtitle dem. Revett v. Braham (a)*, furnishes, however, by no means so valuable an authority as we might expect to find in a trial at bar. The questionable evidence there received was withdrawn by the Court from the attention of the jury. And shortly after, in *Carey v. Pitt (b)*, Lord *Kenyon* expressly pronounced it inadmissible.

Rex v. Cator (c) is in its circumstances very near the present case. And, though only a *Nisi Prius* decision, I apprehend that it has always been considered good law. The defendant was tried for a libel said to be written in a feigned hand. A person from the post-office, supposed to be skillful in the detection of forgeries, was asked to look at certain writings in the defendant's natural hand, and then at the libel, and give his opinion whether the libel was in the same writing. *Hotham B.*, after hearing a very extended argument, rejected the evidence. If this witness had been desired to look at those papers the day before, in order to gain acquaintance with the character of the writing, that case would have been identical with the present. Can this difference between the modes of ques-

(a) 4 T. B. 497.

(b) *Peake, Ad. Ca.* 130.(c) 4 *Esp.* 117.

tioning the witness make the evidence receivable in one case, and not in the other? I apprehend that it may.

The distinction is doubtless very subtle; and in practice the two operations of the mind will be likely to run into each other. But there is an essential difference between casting our eye at the same moment on two objects placed before us in order to judge of their resemblance, and acquiring familiarity with a certain character of handwriting in order to judge afterwards whether a document bears that character. Mr. *Starkie* thinks the former a much more satisfactory method; but I cannot agree with his remark. An ingenious forger might counterfeit every line and angle so correctly that, to a common eye, no discrepancy should betray itself; and yet one who has an intimate knowledge of the individual might detect a striking difference in the general character of the handwriting, as twins may present no observable diversity to a stranger, and yet be distinguished at a glance by their parents. Besides, in taking a witness's opinion on such a point, an appeal seems to be made to his experience and skill, while the mere ocular comparison of two documents in juxtaposition looks like a mechanical proceeding, a mere act of measurement. Whether these reasons may be thought satisfactory or not, there can be no doubt that in former times the law, while it daily acted on opinion derived from knowledge of the character, regarded comparison of hands as extremely dangerous.

The legislature, in stat. 1 *W. & M. c.* 7. (private), declared accordingly the attainder of *Algernon Sidney* void as against law, because (a) the jury were directed to believe the writing his, by comparing it with other writings of

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Murd.
against
Succumbent.

(a) See *antè*, p. 721, note (d).

his.

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Def. det.
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 Somers.

his. Mr. *Starkie* (a) seems to think this recital incorrect, according to our present notion of comparison of hands: and so it certainly is, if the report of the trial in the *State Trials* is faithful. Whether it is or not, we have no means of deciding. *Jefferies* is charged with falsifying these reports in some instances; and it is extraordinary that his summing up omits all mention of *Sheppard*, the first of the three witnesses said to have spoken to the prisoner's writing on the trial (b). None of the numerous pamphlets, however, impute to the report any misrepresentation in this matter of law. On the other hand, when the act for reversing *Sidney's* attainder passed, the memory was green of the atrocious trial which produced it, and the foulness of the admitted proceedings rendered all exaggeration or misstatement superfluous. But, at any rate, the act is a legislative declaration, sanctioned, as we must believe, by *Somers* and the other great lawyers then in office, that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting.

And, though there may be a mistake in supposing that course to have been pursued in *Sidney's* trial, no other sense can be assigned to the words of the statute, but that which Mr. *Starkie* states as the present meaning of comparison of hands, *i. e.* "an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person" (a).

Cases to this effect are collected in a note in the same page (c), though, in the following page (d), an extract is

(a) 2 *Stark. Ev.* 374. (2d ed.)

(b) See, however, 9 *How. St. Tr.* p. 892, where, in the report of *Jefferies's* summing up, *Sheppard's* evidence, and the fact that he had seen the prisoner write, are shortly noticed.

(c) Note (q) to 2 *Stark. Ev.* 374. (2d ed.)

(d) Note (x) to 2 *Stark. Ev.* 375. (2d ed.)

given from the chapter on evidence in *Buller's Nisi Prius*, which speaks of proving the writing of one instrument by a comparison with others; and *Le Blanc J.* twice admitted a comparison of ancient documents (*Roe dem Brune v. Rawlings (a)*), observing that at that distance of time no better evidence could be obtained. Whether better or not I will not undertake to determine; but plainly *Holroyd J.* (one of the most accurate lawyers and profound thinkers that ever sat on the bench) was aware of a different mode of proceeding with ancient documents, and one more conformable with what appears to have been the ancient practice; for he, in the same note, appears to have ruled differently in such a case. A witness produced who was able to swear, from his having examined several of such signatures, that he had obtained sufficient knowledge, was permitted to give an opinion with respect to handwriting *without an actual comparison*; *Sparrow v. Parsons (b)*.

The same note (b) indeed refers to a most remarkable case of *Doe dem Tilman v. Tarver (c)*, in which Lord *Tenterden* directed a person producing a paper bearing a steward's signature, *to compare it with other signatures* of the same steward, in books belonging to the manor, and say, upon oath, whether he believed that the writings were by the same person, observing that he remembered *Lawrence J.*, at *Worcester*, directing a *Mr. Benjamin Price*, accidentally present, to compare a certain ancient writing with others purporting to be written by the same person, and give his opinion on the identity of the

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Doct. dect.
Mubb
against
Surrenders.

¹ (a) 7 East, 282, note (a).

² (b) Note (a) to 2 Stark. Ev. 375. (2d ed.) (c) R. & M. 141.

writings.

1886.

Des dem.

Munn

against

SUGRAMORE.

writing. I presume that the same course was taken in *Roe dem. Brune v. Rawlings* (a). It does not appear, however, that any objection was made to this method of forming an opinion on the writing; nor can it be supposed that any party would be interested in preferring the one mode of proof to the other; nor, indeed, is it quite clear in fact that the method prescribed by *Holroyd J.* was not adopted by the three other learned Judges who have been named, and the comparison made with the idea in the witness's mind, not with the paper itself. Even if it was not, and supposing the direct comparison to be right, it would not follow that that method was wrong, since both may be proper and admissible; and if it was not inadmissible, I am at a loss to discover any difference between that evidence and the evidence which has been excluded on the trial now under consideration.

But we are not now concerned in deciding between two methods of arriving at a knowledge of handwriting; but whether, when the genuineness of it is in issue, the knowledge that may be derived from other productions of the same hand is to be altogether excluded from the inquiry. Now, for my own part, I am ready to avow my entire concurrence in the sentiments of my brother *Peake* on this point, but that my opinion goes much farther than his. He says (b) (reviewing the cases of *Macferson v. Thoytes* (c), *Rex v. Cator* (d), and others of the same period), "the analogies of law, however, appear strongly to support the admissibility of this evidence; for opinion, founded on observation and experience, is received in most questions of a similar

(a) 7 East, 282, note (a).

(b) *Peake's Ec.* 103.(c) *Peake, N. P. C.* 20.

(d) 4 Esp. 117.

nature. There is a certain freedom of character in that which is original, which imitation seldom attains, and the want of that freedom is more likely to be detected by one whose attention has been directed to the subject, than by another who has never given his mind to such pursuits. It does, therefore, seem rather too much to say, that such evidence is in all cases inadmissible, though it certainly ought to be received with great caution, and meet with little attention, unless as corroborating other and stronger evidence."

With regard to the form in which the question was proposed in the late trial, if the examples of Lord *Kenyon*, *Le Blanc J.*, and *Lawrence J.*, and Lord *Tenterden*, render it doubtful whether it was the only proper form, I think, on tracing the subject through the books, that it was the *most* proper form. If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury, which every one of them, even though illiterate, might as well perform for himself. But, if he is a person of some skill (however low in degree, and however generally shared with him), he does what possibly the jury may be incompetent to do. Even in these times, some may serve on juries who cannot read and write; but to produce a person, who could barely read and write, to speak of his own knowledge and judgment in handwriting, would rather tend to throw ridicule than any degree of light on the cause. The witness must be conversant with handwriting, a banker, a printer, the officer of a court of justice (which was the description, I believe, of Mr. *Price*, when Lord *Tenterden* attended the *Oxford* circuit as a barrister, and Mr. Justice

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Lawrence placed the documents in his hand (a), to be entitled to any degree of authority.

From the substitution of a witness for the jury, in forming an opinion on the genuineness of handwriting, an advantage follows so great and obvious, that it would form a strong motive for so framing the rule of evidence; I mean the prevention of that distracting multiplicity of issues which a jury might be called upon to try, arising out of every one of the whole number of documents placed before them. If this could be done, a legitimate argument might be raised from the internal evidence of the contents of each paper, and the nature of each transaction alluded to therein. On these points the party could not be expected to come prepared; and infinite injustice might ensue from prejudices of every kind. I therefore entirely adhere to *Doe dem. Perry v. Newton* (b), in which we refused a rule nisi for a new trial, moved for on the ground that my brother *Cole-ridge* had excluded papers tendered in evidence for the mere purpose of being compared with some which were proved. Indeed, in *Griffith v. Williams* (c), which was urged as an authority for receiving such evidence, the Court of Exchequer drew precisely the line which I think the true one, observing that the Court and jury might compare letters when they had been admitted for the general purposes of the cause, though witnesses are only permitted to compare them with the character of handwriting impressed on their own minds.

The same effect, I am aware, might possibly be produced, if the writings, from which the handwriting was judged of, were in Court; for I apprehend the jury

(a) See *Doe dem. Tilman v. Tarver*, R. & M. 143.

(b) *Ante*, p. 514. 1 Nev. & P. 1.

(c) 1 Cro. & Jer. 47.

might

might then desire to see the documents on which the witness judged: and my brother *Parke* has informed me that at *Nisi Prius* he has felt himself bound to permit them. Prejudice might thus be unfairly excited by a crafty selection. This would be an abuse; and, when exposed in broad daylight, would draw the usual consequences of taking unfair advantages on the party making the attempt. But the possibility of abuse is no reason for excluding what may throw light on the truth, and is, in its own nature, evidence.

Some other matters were discussed at the bar, connected with this interesting subject, which do not require a detailed notice. On the question whether handwriting, looked at by itself, is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish means for forming an opinion, and *Gurney v. Langlands* (a) is a correct decision, I think, of *Wood B.*, supported by the dicta of Lord *Tenterden* and *Holroyd J.*, that such an opinion cannot be received from one not acquainted with the handwriting supposed to be imitated. I do not indeed understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill; but I do not think that either Court or jury would believe him, or place the least reliance on his opinions; practically, therefore, this chapter may be considered as expunged from the book of evidence.

I know not whether any argument was raised on the knowledge being gained *post litem motam*. But the judgment is almost always formed *post litem motam*, both on handwriting and other subjects of speculation. There seems no reason why the knowledge should be

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Mund
against
SUCKERWORK.

(a) 5 B. & Ald. 330.

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 against
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not obtained in the same stage; indeed, the opinion of medical men is constantly taken on facts brought to their knowledge during the trial.

On the whole, I think the question regular, and the exclusion of the evidence improper; but, the Court being equally divided, the rule for a new trial must be discharged.

Rule discharged. (a)

(a) The apparent inaccuracy in the statute reversing *Sidney's* attainder is noticed by Mr. *Phillips* in 1 *Phil. Ev.* p. 466. (6th ed.), and 2 "*State Trials*," p. 111.; and had before been pointed out in p. 184. of Sir *W. D. Evans's* treatise (cited p. 723. *antè*), and in a note to 9 *Howell's St. Tr.* 864. Mr. *Hallam*, too, observes upon it, in his *Constitutional History of England*, vol. ii. p. 690. 2d ed., where, after stating that the evidence of handwriting, "unless the printed trial is falsified in an extraordinary degree," was such as would be received at present, he adds, in a note, "Though *Jefferies* is said to have garbled the manuscript trial before it was printed, (for all the trials, at this time, were published by authority, which makes them much better evidence against the judges than for them,) yet he can hardly have substituted so much testimony without its attracting the notice of *Atkins* and *Hawles*, who wrote after the revolution. However, in *Hayes's* case, *State Trials*, x. 312., though the prisoner's handwriting to a letter was proved in the usual way by persons who had seen him write, yet this letter was also shown to the jury, along with some of his acknowledged writing, for the purpose of their comparison. It is possible therefore, that the same may have been done on *Sidney's* trial, though the circumstance does not appear. *Jefferies* indeed says, 'comparison of hands was allowed for good proof in *Sidney's* case.' *Id.* 313. But I do not believe that the expression was used in that age so precisely as it is at present; and it is well known to lawyers that the rules of evidence on this subject have only been distinctly laid down within the memory of the present generation." Mr. *Starkie* also suggests (2 *Stark. Ev.* 374. 2d ed.) that at, and for some time after, the period of *Sidney's* attainder, the terms "comparison of handwriting" were understood as including that which is now considered the legitimate course of proof.

Whether actual comparison in Court was or was not resorted to on *Sidney's* trial, the objection there taken seems to have extended to all the evidence offered on this branch of the case. When *Sheppard* deposed to *Sidney's* handwriting, and stated, as his means of knowledge, that he had seen the prisoner write several indorsements, *Sidney* objected that "similitude of hands can be no evidence," 9 *How. St. Tr.* 854.; and in his defence he repeated that "there is nothing but the similitude of hands offered for proof,"

proof," 9 *How. St. Tr.* 864., adding, p. 865., "The similitude of hands is nothing: we know that hands will be counterfeited, so that no man shall know his own hand." In Sir John Hawles's *Remarks on Colonel Algernon Sidney's Trial*, printed, 9 *How. St. Tr.* 999, from a work published in 1689, the objection is thus stated: — "And as this indictment was an original in one part," "the evidence on it was an original in another part, which was proving the book produced to be Col. Sidney's writing, because the hand was like what some of the witnesses had seen him write; an evidence never permitted in a criminal matter before." P. 1003. It is remarkable, that while Hawles, condemning the course taken at Sidney's trial, makes at least no express complaint of any "comparison" in the modern sense of the term, North, who defends the proceedings against Sidney, alludes to this part of them as follows: — "I may justly say there was not only the common proof of the opinion of witnesses, but writings produced and sworn to be his hand, as bills, and letters, and compared in court; but the prisoner made a considerable defence against that sort of evidence." *Examen*, Part II. c. 5. s. 150. p. 409. ed. 1740.

It seems probable that the objection pointed at by the Act of Reversal was considered by all parties as applying, not to the process by which the similitude of handwritings was ascertained, but to the practice of allowing that similitude to go to the jury at all as proof in a criminal case, unless as an adjunct to other evidence upon the point to which it was adduced; mere opinion of handwriting, however formed, being thought, by the objecting party, too slight a testimony to countervail the ordinary presumption in favour of innocence. Burnet, in his *History of his own Time*, says (referring to the trial of Sidney): "As for the book, it was not proved to be writ by him; for it was a judged case in capital matters, that a similitude of hands was not a legal proof, though it was in civil matters;" vol. ii. p. 396. ed. 1823; to which is subjoined, from a note by Speaker Onslow, "Quære, whether that was a mistake, and so now allowed?" (The mention of a "judged case" may perhaps be an inaccurate reference to that of *Roy v. Da. Ma. Carr*, 1 *Sid.* 418., on an information for perjury, which was cited by Sidney on his trial.) On the *Trial of the Seven Bishops*, the objection to "comparison" of handwriting was not only that the evidence offered was unsatisfactory, but that it was so because the case was a criminal one (see p.p. 735, 736, ante); which argument was adopted by Powell and Holloway Jrs., 12 *How. St. Tr.* 305, 306. The supposed distinction between civil and criminal cases, with the reason drawn from the balance of presumptions, will be found fully stated in *Gilbert's Law of Evidence*, p. 46. (of the 6th ed.) The author there observes, that, in a case of perjury assigned on an answer in Chancery, though there be no witness to prove directly that the party swore it, the perjury may be "illustrated" by a comparison of hands, "which possibly may be evidence in concurrence with other proof," shewing, independently of the document itself, the identity of the party: and he then proceeds to state his opinion of the law as to comparison of hands, pronouncing it to be good proof in civil cases, but not in criminal, be-

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cause of the presumption in favour of the defendant, and concluding as follows: — "Therefore, when the comparison of the hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing."

Consistently with this doctrine, in *Rex v. Crosby*, 12 Mod. 72. (S. C. 1 Ld. Ray. 39.), on an indictment for high treason, several treasonable papers being produced which witnesses swore they believed to be the handwriting of the prisoner, and a question arising, "whether comparison of hands were sufficient?" the Court said, "It is not sufficient for the original foundation of an attainder, but may be well used as a circumstantial and confirming evidence, if the fact be otherwise fully proved; as in my Lord Preston's case," (Trial of Sir Richard Grahme and others, 12 How. St. Tr. 726. 736.), "his attempting to go with them into France, and principally where they were found on his person; but here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of Colonel Sidney's Case." And, in the case of *Sidney*, it would appear that he himself conceived the error on this subject to lie in permitting any proof of handwriting, founded merely on opinion, to pass as substantial and independent evidence. For, in "The Apology of Algernon Sydney in the Day of his Death," (written between his trial and execution, and published with his Discourses concerning government, London, 1763; also printed in 9 How. St. Tr. 916.) he states, among the points of law which he was desirous of raising at the trial; "7thly, That, supposing the Lord Howard to be a credible witness, he is but one: no man can be thereupon found guilty, as appears by *Whitebread's case*;" (see 7 How. St. Tr. 120.); "the papers cannot be taken for another witness; similitude of hands is no evidence, whosoever writ them; they can have no concurrence with what is said, being unknown to him, written many years since," &c. 9 How. St. Tr. 931. And he makes no complaint of the manner in which the "similitude" was established. In the Report to the House of Lords, December 20th, 1689, from the "Committee for Inspections of Examinations, concerning the Murders of Lord Russell, Colonel Sidney," &c., *Lords' Journals*, vol. xiv. p. 377., 9 How. St. Tr. 951., three depositions are set out, detailing the acts of injustice committed on *Sidney's* trial; in none of these statements is any comparison of documents in court by witnesses, or by the jury, mentioned; but one of the deponents, who had been "of counsel for Colonel Sidney," states that, after the conviction, *Sidney* told him, "that they proved the paper which they accused him of, for being his handwriting, by a banker, who had only once his hand to a bill; and to that he quoted the Lady Carr's case;" (1 Sid. 418., but not as here cited; and see, as to that case, 16 How. St. Tr. 200—204., and 546.); "wherein it was adjudged, 'That, in a criminal case, it is not sufficient for a witness to swear he believes it to be the hand of the party; but that he saw the party write it.'"

See also the discussions on this point of *Sidney's* case, in the trial of *Layer*, 16 How. St. Tr. 200. 203. 4.; and the argument of Mr. Wynne, counsel for Bishop *Atterbury*, 16 How. St. Tr. 544—548.

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GRINDELL *against* GODMOND.Thursday,
November 17th

ASSUMPSIT for money laid out and expended, at defendant's request, in and about the finding, carrying on and prosecuting a certain bill of indictment preferred by one *Mary Godmond*, then and now being the wife of defendant, against the said defendant and others, for assaulting and imprisoning the said *Mary Godmond*, then and still being the wife of defendant, in pursuance of a certain recognizance before then entered into by her the said *Mary Godmond* for that purpose: and on an account stated. Plea, non-assumpsit. On the trial before *Alderson B.* at the *York Spring assizes*, 1835, the following facts appeared. The defendant, having ill-treated his wife, was indicted as above mentioned, on her prosecution, at the *Beverley sessions*, together with some other parties. He was convicted, and sentenced to twelve months' imprisonment, and to pay a fine of 50*l.* The wife had requested *Johnson*, an attorney, to carry on the prosecution for her, which he had refused to do unless money was advanced: she then applied to the plaintiff, her brother, and he paid 66*l.* towards the costs of the prosecution, and made himself liable for the residue of *Johnson's* bill (*a*). The particulars of demand were for cash paid in the course of the prosecution, on account of witnesses' expenses; for monies paid to *Johnson* in respect of his disbursements; and for the balance of *Johnson's* bill; the whole demand amounting to 115*l.* It was insisted, on behalf

Where a wife, ill treated by her husband, indicts him for assaulting and imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessities.

Otherwise, *semble*, if she exhibit articles of the peace against her husband.

(*a*) The facts of the case, as above, were admitted without proof.

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of the defendant, that the action did not lie. A verdict was taken for the plaintiff for 115*l.*, with leave to the defendant to move to enter a nonsuit; the bill to be taxed if the verdict stood. A rule nisi for entering a nonsuit was obtained in the ensuing term.

Cresswell now shewed cause. *Shepherd v. Mackoul* (a) shews that an attorney, who has acted for a wife in exhibiting articles of the peace against her husband, may recover against him for the business done, if it be clear that the proceeding taken was necessary for her protection. If any evidence of such a necessity appeared in the present case, there could not be a nonsuit. In exhibiting articles of the peace, the intention obviously is to avoid an impending evil; but in prosecuting an indictment, also, the object is, not merely to punish for what is passed, but to be secured from future injury; and an indictment, successfully prosecuted, would be even more effectual for this purpose than the exhibition of articles. It was clearly necessary, here, to prevent a repetition of the violence complained of. In *Williams v. Fowler* (b) it was held that an action lay against a husband for the costs of proceedings against him on the prosecution, and at the suit, of his wife. In *Harris v. Lee* (c), although it was admitted that a wife cannot at law borrow money, even for necessaries, so as to bind her husband, it was held that, the money having been applied to the use of the wife for necessaries, the lender must, in equity, stand in the place of those who had supplied her, and who would otherwise have been creditors of the husband. The demand here for the 66*l.* actually paid comes directly within the authority of

(a) 3 *Camp.* 326.(b) *M^c Clel. & Y.* 269.(c) 1 *P. Wms.* 482. *S. C. (Anonymous) Prec. in Chanc.* 502.

the cases cited; the residue, which is still owing to the attorney, and for which the plaintiff is liable, falls under the same principle; for the assistance was necessary, and the wife actually received it. [*Coleridge J.* mentioned *Jenkins v. Tucker (a)*.] There the debts were strictly the wife's; the necessities had been contracted for and supplied before the plaintiff advanced his money; the wife gained no advantage by his interposition. Here the required services could not have been obtained but for the advances and undertaking of the plaintiff.

Alexander, with whom was *Wightman*, contra, was stopped by the Court.

LORD DENMAN C. J. We are all satisfied that this action cannot be maintained. It is impossible to say that, under any circumstances, a prosecution of the husband is necessary for the wife, within the rule on this subject. If she apprehends ill-treatment from him, she has another mode of proceeding open to her, by exhibiting articles of the peace: in the case of her doing so, *Shepherd v. Mackoul (b)* would be an authority. In *Williams v. Fowler (c)* there was evidence of an express agreement by the husband to pay the bill if reasonable. In *Harris v. Lee (d)* the question was whether trustees for discharging the husband's debts were liable to the plaintiff for money lent by him to the wife to pay surgeons for curing her of a disease; and the Master of the Rolls, considering that what had been done was in the course of obtaining necessities, held that the plaintiff

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(a) 1 H. Bl. 90.

(b) 3 Camp. 326.

(c) M' Clel. & Y. 269.

(d) 1 P. Wms. 482. S. C. (*Anonymous*) Prec. in Chanc. 502.

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should stand in the place of those who would have been creditors if the money had not been advanced. Unless the indictment here was a necessary, the defendant cannot be charged.

PATTESON J. It is clear that all the authorities apply to the case where necessities have been obtained for the wife. It cannot be said that an indictment against the husband for assaulting his wife is a necessary.

WILLIAMS J. I am of the same opinion. There is nothing here to raise an assumpsit in law.

COLERIDGE J. concurred.

Rule absolute.

Friday,
November 18th.

MANNING *against* WASDALE.

The privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a profit à prendre, but a mere easement.

Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken.

Seemle, that, supposing such a right to be a profit à prendre, a declaration stating the plaintiff to be entitled to it, by reason of his occupation of an ancient messuage with the appurtenances, "for the more convenient use and enjoyment of his said messuage and premises," would not be bad on general demurrer, for want of expressly limiting the claim to water taken by cattle levant and couchant, or to be used on the premises.

said,

said, to wit &c. (naming the pond), and also of taking and using the water of the said pond for culinary and other domestic purposes, for the more convenient use and enjoyment of his said messuage and premises, every year and at all times of the year, at his free will and pleasure; yet the defendant, well knowing &c., whilst the plaintiff was and continued to be an inhabitant and residing within the said parish in manner aforesaid, and so entitled to the said privilege and easement, to wit 10th *October* 1815, and on divers other days and times between &c., wrongfully and unjustly encroached upon and closed up, contracted and narrowed, and filled up, lessened, and obstructed the said pond, to wit by putting, placing, and throwing therein and thereon divers large quantities of bricks, &c., and thereby diminished, soaked up, and absorbed divers large quantities of the water of the said pond, and continued and kept the same pond so closed up, &c., and the water thereof so diminished, &c., for a long space of time, to wit from the day and year aforesaid hitherto, and thereby rendered the plaintiff's access to the said pond, for the enjoyment of his privilege and easement aforesaid, less convenient and easy.

The second count claimed the use, benefit, privilege, and easement of washing and watering the plaintiff's cattle in the said pond, and of taking and using the water thereof, for his domestic and other purposes, at all times of the year; and described the nuisance to the pond somewhat differently.

Second plea to the first count. That the plaintiff has not, nor have the owners or occupiers of the said messuage for the time being, in the said first count mentioned, at any time within twenty years next before the

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committing of the grievances in the said first count mentioned, used, exercised, or enjoyed the said use, benefit, privilege, and easement, in the said first count mentioned, in manner and form &c. Verification.

Seventh plea, to the second count, like the second plea, *mutatis mutandis*.

Demurrer, assigning for cause that non user alone, as alleged, for twenty years, is insufficient to destroy the rights and easements; and that the pleas allege mere matter of evidence, which at most would only found a presumption in law of a release or other conveyance or abandonment of the rights; and that the defendant, if he means to rely on lapse of time as evidence of a release, destruction, or extinguishment of the right, ought to have distinctly pleaded the legal effect of such evidence; and that neither of the pleas alleges that the plaintiff has at any time acquiesced in any interruption to or disturbance of his rights, nor in fact that there ever has been at any time any interruption; nor do the pleas deny that the plaintiff has continually asserted his right during the whole period of the said twenty years; and that it is consistent with the pleas, that the rights and easements claimed continue altogether undisturbed and unaltered. Joinder in demurrer.

The Court called on

Wightman for the defendant. The declaration is bad. The right claimed is divisible. The plaintiff claims, by reason of his occupancy of a messuage, the right to take the water for washing and watering his cattle, and for culinary purposes. This is a claim to take as much water as he pleases for cattle whencesover they come, and for culinary purposes in as many places as he pleases.

The

The first claim should have been limited to cattle levant and couchant; the second to culinary purposes in the plaintiff's house. Otherwise the pond might be exhausted. This is the rule as to all profits à prendre. Every claim to take on the soil of another, as, for instance, turbary, must be so limited that the concurrent rights of others may not be encroached upon; *Valentine v. Penny* (a). Thus it is said, in an *Anonymous* case in *March's Reports* (b), that "Prescription to have common for all his cattle commonable is not good, for thereby he may put in as many beasts as he will. But a prescription to have common for his cattle commonable levant and couchant, is a good prescription." *Jeffry v. Boys* (a) and note (3) to *Mellor v. Spateman* (c) are to the same effect. That the claim is too large appears from the language of Lord *Ellenborough* in *Wilson v. Willes* (d), though that was the case of a custom; but the judgment there did not turn upon the objection to the claim of custom, as opposed to prescription. The principle therefore applies, even considering this as a prescription. But, as a custom (simply claimed for an inhabitant, and not for the occupier of the particular messuage), it is clearly bad, being a claim to take profits in alieno solo; *Gateward's Case* (e), *Blewett v. Tregonning* (g). [*Patterson J.* May not the words "for the more convenient use and enjoyment of his said messuage" be an informal way of limiting the claim, and so good on general demurrer?] These words do not limit, any more than the allegation that the right is by reason of the occupation. This is a right appurtenant to the messuage;

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(a) *Noy*, 145.(b) *March*, 83. pl. 137.(c) 1 *Wms. Saund.* 346. f.(d) 7 *East*, 121.(e) 6 *Rep.* 59 b.(g) 3 *A. & E.* 554.

1836. *Tyrringham's Case* (a): and the limitation must be expressed; it is not enough simply to connect it with the message (b). If the defendant had traversed the right, the plaintiff would have insisted that he might prove his right for any quantity of water. [Patteson J. In *Corbyson v. Pearson* (c) it was held that, after verdict, by the statute of jeofails, where a party justified for a right of common for his beasts levant and couchant, and averred that he had put them in *utendo communia sua predicta*, it should be intended that the beasts were such as might use the common.] After verdict it would be intended that the proof had been given as to such only. [Patteson J. That would have been by common law; but the decision was that the intendment might be made by the statutes of jeofails (d). Coleridge J. Can this be called a profit à prendre at all? Water is publici juris. In stat. 2 & 3 W. 4. c. 71. s. 1. right of common or profit to be taken is distinguished from easement, watercourse, or "the use of any water," mentioned in sect. 2.] *Primâ facie* the right to the water is in the owner of the soil: the plaintiff here claims, not the use of it in its passage, as an easement, but the right to abstract it from the soil. He, therefore, claims it as a profit à prendre, not as an easement. [Coleridge J. You cannot bring an action to recover a pond; 2 *Bla. Com.* 18.]

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Kelly, contra. The claim is sufficiently limited in the declaration; at any rate, there is no more than an informality, cured by pleading over. The right to water "for the more convenient use and enjoyment" of the

(a) 4 *Rep.* 36. b.

(b) See *Morse and Webb's Case*, 19 *Rep.* 65.

(c) *Cro. Eliz.* (458).

(d) See note (1) to *Stennel v. Hogg*, 1 *Wms. Saund.* 228 a.

message can be only a right to so much water as would be required to enable the plaintiff to use and enjoy the message more conveniently. It must clearly be used upon the premises. And it may be remarked that the pond, if supplied by a spring, would be inexhaustible. The Court will put a reasonable construction on the language of the declaration. Could it be argued that a claim to use a highway for carriages, horses, and servants, was bad, because a party might put so many carriages, horses, and servants, on the highway, at one time, as to obstruct it? Besides, this is not, as assumed by the objection, a profit à prendre. It is a mere easement. Thus it was said, arguendo, in *Fitch v. Rawling* (a), that a custom to water cattle at a certain watering place was an easement (b), though this was an admission making against the general object of the argument. This was cited in *Blewett v. Tregonning* (c), and not disputed. [*Wightman*. There the instance was adduced as shewing, a fortiori, that the right to take sand from another's soil was mere matter of easement; it would have shewn this if the dictum had been good law; yet the Court held the latter right to be a profit à prendre; and they decided that there could be no custom for inhabitants to take the sand in alieno solo.] Such a right as that claimed here has often been the subject of actions.

Lord DENMAN C. J. It is not consistent with ordinary language to call the taking of water a profit à prendre. But, assuming it to be so, I cannot see that

(a) 2 H. Bl. 395.

(b) *Pain v. Patrick*, 3 Mod. 294., is cited (but quære if to this point). The dictum there refers only to a watercourse. In *Goodday v. Michell*, Cro. Eliz. 441., a way to a common fountain is mentioned as an easement claimable for parishioners by custom.

(c) 3 A. & E. 571.

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the declaration here necessarily claims more than enough for the supply of water for the culinary purposes of the house, and for cattle levant and couchant on the premises. There is, therefore, no objection available on general demurrer.

PATTESON J. At all events, the declaration is not bad on general demurrer. Strictly speaking, the words "for the more convenient use and enjoyment of his said messuage and premises" may not be applicable to cattle: but the allegation is well enough on general demurrer. [*Wightman* suggested that the limitation was not in the second count.] It is then necessary to decide the other question; and I am of opinion that this is not a profit à prendre, which must be something taken out of the soil. And, if there is any mode in which the declaration here can be supported, it is sufficient. Now it occurred to me, as an instance, that inhabitants of a parish might have a right to an easement of this sort, and that afterwards there might be an inclosure act directing commissioners to set out the pond, so that an inhabitant might acquire a right against strangers, answering to the statements in this declaration.

WILLIAMS J. I think the restriction in the first count is sufficient; and, as to the second, I agree that this does not appear to be a profit à prendre.

COLERIDGE J. My judgment rests upon a ground which makes the difference between the two counts immaterial. I think the right claimed in each is a mere easement.

Judgment for the plaintiff (a).

(a) See *Tyler v. Bennett*, ante, p. 377.

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The KING *against* The Inhabitants of the *Monday,*
Parish of EASTRINGTON. *November 21st.*

INDICTMENT for non-repair of a highway. The indictment described the portion of highway in question as situate in the parish of *Eastrington*, in the East Riding of *Yorkshire*, and alleged that the inhabitants of that parish ought to repair.

Plea, that within the parish aforesaid there now is, and from time whereof &c. there hath been, a certain township called the township of *Eastrington*, and that the part of the said highway alleged in the indictment to be out of repair is, and at the time of the taking of the inquisition was, situate within the said township: and that the inhabitants of the said township, from time whereof &c., have repaired and amended, and been used and accustomed &c., and during all the time aforesaid ought &c., “and still of right ought, to repair and amend all the common highways within the said township *that would be otherwise repairable by the inhabitants of the said parish at large*; and that the inhabitants of the said parish at large have not during all or any part of the time aforesaid repaired and amended; and have not been used or accustomed to repair or amend, and of right ought not to repair or amend the King’s common highways within the said township, or any of them; and that by reason of the

Indictment, alleging that a public highway within a parish is out of repair, and that the parish ought to repair it. Plea, that the highway lies in a township within the parish; that the inhabitants of the township have been accustomed, and ought, to repair all public highways within it *which otherwise would be repairable by the parish at large*; that the parishioners never have repaired the said highway; and that, by reason of the premises, the township ought to repair, and the parish ought not to be charged. Replication, traversing the custom for the township to repair all public highways within it which would otherwise &c.

Verdict for defendants.

Judgment arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not shew what party other than the defendants was liable to repair.

Judgment for the Crown non obstante veredicto, refused.

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premises the inhabitants of the said township ought to have repaired and amended, and still ought to repair and amend the part of the said highway in the said indictment specified, and thereby alleged to be out of repair, when and so often as it hath been and shall be necessary, and that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same."

Replication, that the inhabitants of the said township, from time whereof &c., have not repaired &c., and have not been used and accustomed &c., and during all the time aforesaid ought not &c., and still of right ought not, "to repair and amend all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large, as in the said plea is above alleged." Issue was joined on this traverse.

On the trial before *Alderson B.*, at the *York Spring assizes, 1835*, a verdict was found for the defendants; and in the ensuing term *Starkie* obtained a rule to shew cause why judgment should not be entered for the Crown non obstante veredicto, or why judgment should not be arrested. The ground of application was that the plea did not state the highway in question to be one which but for the alleged custom would be repairable by the parish at large, and did not shew who were the parties liable to repair.

Cresswell and *Alexander* now shewed cause. The prosecutors cannot have judgment non obstante veredicto, unless the Court can see distinctly, on the whole record, that the verdict ought to have been for the Crown; note [c] to *Bennet v. Holbech* (a). The pa-

(a) 2 *Wms. Saund.* 319 c. 5th ed.

rishioners here allege that they are by custom exempt from repairing all roads which, but for the custom, would be repairable by them; and the jury have found the custom: but the objection is, that this is not alleged to be a road which, but for the custom, would be repairable by the parish. If it were not such a road, the parish could not be liable, on the present verdict. The plea expressly denies the liability of the parish; the prosecutors say that it does not in terms state whether the township or a third party is liable; but, even if the replication could be taken to mean that, admitting the custom as alleged; a third party, and not the township, is liable, that, upon the present issue and finding, would not warrant a judgment non obstante veredicto. Nor is there any ground for arresting the judgment. The plea and indictment must be taken together. The prosecutors found their charge upon the common law liability of the parish to repair all roads within it: the defendants say, in effect, that the whole of such liability is, by immemorial usage, thrown upon the township, so far as that extends. A replication that *A. B.* was liable, *ratione tenuræ*, to repair the road in question, would have been bad; the defendants were not obliged (unless as mere matter of form) to exclude that state of things by averment. Suppose that, in a civil action, the plaintiff declared in covenant, as reversioner, stating that *A.* was seised in fee, and, being so seised, demised for a term of years to the defendant, who entered into the covenant declared upon; and that *A.* died seised, leaving the plaintiff his heir at law. If the defendant pleaded that *A.*, by will duly executed, devised to *C.* all lands of which he was seised in fee, not averring that the lands

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in question were part of them, the declaration would supply that fact, and the plea would be a sufficient answer. So here the indictment supplies the fact that the roads in *Eastrington* township are such as the parish would be liable to repair but for the custom pleaded. And the plea here, after alleging the township to be in the parish of *Eastrington*, and the road in question to be in the township; and after setting forth the custom, alleges that, *by reason of the premises*, the township ought to repair. That averment here is an averment of fact, and fixes the road in question as one which, but for the custom, would be repairable by the parish. The form of plea given in note (10) to *Rex v. Stoughton* (a) contains no averment as to the road being repairable by the parish or any other district but for the custom pleaded; and, although the indictment in *Rex v. Ecclesfield* (b) did contain the statement said to be requisite here, Lord *Ellenborough* takes no notice of it when recapitulating the material parts of the plea in his judgment.

Starkie, with whom was *Wightman*, contra. At least the defendants cannot have judgment. Parishioners indicted for non-repair of a highway lying within their parish, cannot exonerate themselves merely on non debent reparare; and they must shew who is liable; *Rex v. St. Andrew's, Holborn* (c): the same rule may be collected from *Rex v. Yarton* (d). [Lord *Denman* C. J. I do not think there is any doubt on that point; but Mr. *Cresswell* has given an ingenious answer to the objection, by arguing that the aver-

(a) 2 *Wms. Saund.* 159. c.(b) 1 *B. & Ald.* 348.(c) 1 *Mod.* 112.(d) 1 *Sid.* 140. *S. C.*, as *Rex v. Yarenton*, 1 *Keb.* 277, 498, 514.

ment wanting in the plea is supplied by the indictment.] The allegations of the indictment are those usual in every such case. The presumption is, *prima facie*, against the parish. A prosecutor cannot be supposed to know that there is any other party indictable. He can only state that the road is a public highway, is within the parish, and is out of repair. Those allegations cannot be construed into an admission that the road is one which the parishioners would be liable to repair but for a custom which they plead, the plea failing to shew of itself how any other party is liable. But, further, suppose there were within the parish a township containing three districts, in one of which the repairs were done *ratione tenuræ*, in another the district repaired, and in a third the whole township; and the parishioners, being indicted for the non-repair of a road within the township, pleaded as the defendants have in this case. According to the argument on the other side, they would be entitled to judgment, and yet the public could not know, by the result, who ought to be indicted in future. The parishioners, to discharge themselves, must find out the party liable. [*Williams J.* And you argue that there is a general averment of liability in the township, but that the plea does not apply it to the particular road.] Till some other party is shewn to be liable, the presumption must be against the parish, in favour of the public. [*Lord Denman C. J.* The prosecutors apparently do not insist upon the prayer of judgment *non obstante veredicto*. *Patteson J.* That cannot be demanded; it is granted only when the merits are clear; in this case they are not so, if there is a third party who may be liable; and it is on that assumption only that the plea fails.]

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LORD DENMAN C. J. As to the other part of the motion ; I was struck at first with Mr. *Cresswell's* argument, but the reply to it is sufficient. The public, when they find a highway out of repair, cannot know who is the party liable, except as at common law. They proceed, in ignorance as to this point, against the nuisance as they find it. The parishioners, if they would discharge themselves, must point out the party who is liable.

PATTESON J. I am of the same opinion, though, if this had been an action and not an indictment, I should have said that the objection ought to be taken by special demurrer.

WILLIAMS J. concurred.

COLERIDGE J. I am of the same opinion. The parishioners here set up a special defence, that the township has been accustomed to repair such roads within it as would otherwise be repairable by the parish at large ; but they state nothing which applies this to the road in question.

Rule absolute for arresting judgment.

*Tuesday,
November 22d.*

The King against The Inhabitants of the Lower District or Division of CUMBERWORTH and CUMBERWORTH HALF.

This case is reported, 4 A & E. 731.

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WOODHAM *against* EDWARDES.Tuesday,
November 22d.

ASSUMPSIT upon five bills of exchange, for 50*l*. each, accepted by the defendant, drawn by the plaintiff, payable to himself or order.

Plea: that, after acceptance of the bills, and after the term for payment had elapsed, to wit &c., the defendant, being at that time resident in *Scotland*, and subject to the laws thereof, in consideration that certain persons, being, or supposed to be, creditors of him the defendant, should forbear to molest or sue him in respect of any debt, monies, or claims, before and at that time due or supposed to be due to them or any of them from him, made his certain deed or writing, by which deed or writing (duly stamped and attested according to the law of *Scotland*, and shewn to the Court here), defendant did alienate, assign, dispose, convey, and make over to and in favour of *John Donaldson*, and to such person or

In assumpsit on a bill of exchange against the acceptor, defendant pleaded that, after the accepting and after the time for payment, he, being resident in *Scotland*, and subject to the laws thereof, in consideration that certain supposed creditors should forbear to molest or sue him, made his deed or writing, duly stamped and attested according to the law of *Scotland*, by which he conveyed to *J. D.*, and such persons

as might thereafter be appointed trustees by the creditors, for the use of the creditors mentioned in the deed, and of other creditors whom the trustees should assume into the benefit of the disposition, all his moveable estate in *Scotland*, in lieu and full satisfaction and discharge of all his debts owing to the said creditors; that notice of the execution of the deed was given to divers supposed creditors in *Scotland* and *England*, including the plaintiff; that plaintiff, by writing signed by him, and valid by the law of *Scotland*, appointed *H. R.* his attorney, to concur in and adopt the deed, and receive the dividends; that *H. R.* did adopt the deed and its provisions on plaintiff's behalf, acted therein as plaintiff's authorised agent, took part in the management of the estate, &c.; that other creditors, in consideration of the said assignment, and the acceptance thereof by plaintiff, agreed to accept, and did accept, the same, in full satisfaction of their debts; that funds of defendant had since become available under the deed for the benefit of the creditors, sufficient to pay the debts of defendant, including that to plaintiff; and that all the proceedings were pursuant to the laws of *Scotland*; whereby, and by reason of the premises, and by the aforesaid laws, defendant had become absolutely discharged from the causes of action stated in the declaration.

Replication, that the defendant had not become nor was discharged in respect &c., in manner and form &c., on which issue was joined.

Held that, assuming that the allegations in the plea respecting the law of *Scotland* could be rejected (and s^emble, that they could not), and the plea be construed as setting up a defence according to the law of *England*, such a defence was not shewn on the plea; that the pleadings, therefore, must be understood to put in issue the law of *Scotland*; and that the defendant, to succeed on the plea, was bound to prove such law as a fact.

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persons as might thereafter be appointed by his creditors as trustees, to and for the use of his said creditors in the said deed mentioned, and of other creditors whom the said trustees should assume into the benefit of the said disposition, all and sundry his moveable goods, furniture, &c., and other effects, and in general the whole moveable estate presently appertaining and belonging to him, situated within the kingdom of *Scotland*, together with the lease of his dwelling-house at *Clermiston*, to and in favour of the said trustees and of such other persons as his said creditors might thereafter appoint trustees, whom he did thereby surrogate and substitute in his full right and place thereof, in lieu of, and in full satisfaction and discharge of all the said debts, monies, and claims, due from him to the said creditors; that notice of the execution of the said deed or instrument of disposition was given to divers persons being or supposed to be creditors of the defendant, as well in *Scotland* as in *England*, and, among the rest, to the plaintiff; that plaintiff by his writing signed by him, and which writing was, by the law of *Scotland*, valid and effectual in that behalf, did nominate and appoint one *Henry Richards* as his attorney in that behalf, and as such attorney empowered him to concur in and adopt the said deed, and to receive the dividends which might and should become due in respect of the said property by virtue of the said assignment; and that *H. R.*, by virtue and in pursuance of such nomination, appointment, and authority, did adopt the said deed for and on behalf of the plaintiff, and did act therein as his authorised agent, and was appointed one of the committee chosen by the said creditors for the management and distribution of the defendant's estate and effects, and attended meetings of
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the creditors under the said deed, and voted and acted as the representative of the plaintiff in the matters thereof in that behalf; that divers other persons, creditors of the said defendant, to wit &c. (naming twenty-four persons or firms), in consideration of the execution of such assignment by defendant, and the acceptance thereof by plaintiff as aforesaid, did agree to accept the assignment of the goods and chattels of defendant as aforesaid, and did accept the same, in lieu of and in full satisfaction of their respective debts and claims. The declaration then alleged that, from the time of executing the said trust deed by defendant, and the adoption thereof by plaintiff as aforesaid, defendant had not at any time accepted any other bill of exchange drawn upon him by plaintiff, and that plaintiff had no cause of action against defendant except those mentioned in the declaration, and which accrued before the execution of the deed by defendant and the adoption thereof by plaintiff as aforesaid; that, since the execution &c., and the adoption &c., certain funds, goods, and chattels of the defendant, of the value of 2000*l.* and upwards, have become available under the trust deed for the benefit of the creditors of the said defendant, and for the benefit (among others) of the said plaintiff, and that the said sum of 2000*l.* is sufficient to pay all the debts of defendant in the said trust deed mentioned, and, among the rest, the debt of the plaintiff. And that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of *Scotland* aforesaid. *Whereby, and by reason of the said several premises, and by effect of the aforesaid laws, he, the said defendant, hath become absolutely discharged in respect of his person, lands, goods, and chattels, from the several causes of*

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action in the said declaration mentioned: and this &c. Verification.

Replication. That the defendant hath not become, nor is he, discharged, in respect of his person, lands, goods, and chattels, from the several causes of action in the said declaration &c., in manner and form &c. Conclusion to the country.

On the trial before Lord *Denman* C. J., at the *Middlesex* sittings after *Easter* term 1835, the defendant's counsel contended that the pleadings admitted his case: and, no evidence being given on either side, the Lord Chief Justice directed a verdict for the defendant, giving leave to move to enter a verdict for the plaintiff. *Dampier* obtained a rule accordingly in *Trinity* term 1835.

Erlé and *Sewell* now shewed cause. The replication is an informal demurrer, admitting all the facts, and taking issue on the law. In order to traverse the facts, the plaintiff should have replied specially; or at least generally, *de injuriâ*. At the time of the trial, it was conceived that a plaintiff could not reply *de injuriâ* in such a case as this: but it has since been ruled that he may; *Isaac v. Farrar* (a). His replication is, however, not so framed as to raise the same issue as a replication *de injuriâ*. The plea formally alleges, at the conclusion, the legal effect of the facts averred in the body of the plea: the replication traverses that allegation of the effect by denying the discharge *modo et forma*, following out the words of the conclusion of the plea: therefore no fact in the body of the plea is traversed by the replication, and there was nothing for the defendant

(a) 1 M. & W. 65. S. C. Tyrwh. & Gr. 281.

to prove. It will be said that the fact as to the operation of the law of *Scotland* was in issue under the *virtute cujus*. But the *virtute cujus* only collects the facts contained in the plea, and, without introducing new matter, draws a conclusion from them; and such a *virtute cujus* is not traversable. If it introduced new matter, then it might be traversable, *Lucas v. Nockells* (a); but here the plea is perfect of itself, without the *virtute cujus*, which amounts only to an inference of law: and the replication is an issue of law, which is not permitted. But, further, the plea discloses a defence according to the law of *England*, and the allegation as to the law of *Scotland* is merely introduced as one of many circumstances necessary to substantiate that defence. Wherever a debtor consents to hand over his property in trust for all creditors who choose to come in, a creditor who assents cannot sue the debtor on the original debt, because he cannot replace him in the situation in which he was before the transfer was made; *Butler v. Rhodes* (b), *Brady v. Shiel* (c). In this case, the averment of the law of *Scotland* was necessary to shew also the validity of the deed according to the *lex loci*. [*Cole-ridge J.* Does the debtor make a transfer according to the law of *England*, if there be only a parol agreement?] A deed is not necessary, if the assignment be only of chattel interests. Further, the plea shews that other creditors have accepted the assignment in consideration of the plaintiff's acceptance; and a creditor whose assent has induced other creditors to give theirs, cannot recover on the original debt: *Steinman v. Magnus* (a) and a large class of subsequent cases decide

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 WOODHAM
 against
 EDWARDS.
(a) 10 *Bing.* 157.(b) 1 *Esp.* 236.(c) 1 *Campb.* 147.(d) 11 *East*, 390: *S. C.* 2 *Campb.* 124.

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this; and the principle was admitted by *Buller J.* in *Heathcote v. Crookshanks* (a), and lately adhered to, at Nisi Prius, in *Seager v. Billington* (b). [Lord Denman C. J. Suppose they had produced evidence that this was not a discharge by the law of *Scotland*, do you say that you still might have insisted upon its being a good discharge by the law of *England*?] Certainly the argument, as to this branch, must go so far.

Smirke contra. The argument of the defendant is, that the replication traverses nothing but the inference of law from the facts stated in the plea, and, therefore, that the facts themselves are admitted; and that these constitute a good defence. But the rule is that matter of law mixed with matter of fact is traversable; *The Grocers' Company v. The Archbishop of Canterbury* (c), *Lucas v. Nockells* (d). Here the allegation traversed is a mixed inference, first of *Scotch* law, next of *English* law: for, whether the facts stated in the introductory part of the plea are a discharge by the law of *Scotland*, is a question of *Scotch* law, which is mere matter of fact; *Male v. Roberts* (e). A traverse of those facts would be wrong; for they may be all true, yet may not constitute a defence by the law of *Scotland*. Supposing the circumstances stated in the plea to be a good discharge in *Scotland*, then it is an inference of *English* law that a discharge good in that country is also available in the *English* courts. The replication, therefore, puts the defendant on the proof, if not of all the matters in the plea, at least that the matters set forth in it are a defence

(a) 2 T. R. 28.

(b) 5 C. & P. 456.

(c) 2 W. Bl. 770, 776.

(d) 10 Bing. 157.

(e) 3 Esp. 163.

by the *Scotch* law; and for this purpose he ought to have called witnesses on the trial. Even if the allegation traversed had been (which it is not) a mere inference of law, yet it does not follow that the defendant would not be obliged to prove the facts contained in the plea, having chosen to take issue on the traverse instead of demurring: thus *nil debet* is a bad plea to a bail bond, because it refers matter of law, viz. the validity of the bond, to the jury, *Smith v. Whitehead*, cited in *Warren v. Consett* (a): yet, if the plaintiff takes issue on it instead of demurring, the defendant is let into any defence under it; *Rawlins v. Danvers* (b).

It is however said that the defendant is intitled to reject all reference to the law of *Scotland*, and insist on the facts as a good defence by the law of *England*. But, first, the assignment, authority, &c., are only stated to be good by the law of *Scotland*, and the plea throughout entirely relies on it; so that, if all reference to that law be suppressed, the plea will fail altogether. Secondly, even if this difficulty be overlooked, the facts will be no discharge by the law of *England*. A substituted agreement, in order to be pleadable as a defence, ought to amount to a release, or to an executed accord, or to give to the plaintiff a clear ground of action in lieu of the one on which he sues, as in *Good v. Cheesman* (c), and *Cartwright v. Cooke* (d). The instrument set forth is only a partial trust in favour of certain creditors, to which the plaintiff was no party. It is not said that he accepted it in satisfaction, or agreed to forbear to sue, or that the trustee "assumed" the plaintiff "into the benefit" of the disposition, or that all, or a majority, of

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 against
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(a) 2 *Ld. Raym.* 1503.(b) 5 *Esp.* 38.(c) 2 *B. & Ad.* 328.(d) 3 *B. & Ad.* 701.

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the creditors came in, or that the plaintiff received any benefit whatever from the arrangement (a). (He was then stopped by the Court.)

LORD DENMAN C. J. The argument for the plaintiff is, that the fact as to the law of *Scotland* is put in issue by this replication, which traverses the discharge alleged in the plea to arise from that law; and that, if this be the effect of the issue, the plaintiff is intitled to recover, because the defendant has not proved what he undertook to prove. On the other side, it is said that, whether the issue be well joined or not, the plea shews a good defence according to *English* law. But that does not appear to be the case. There is no binding deed; and nothing is shewn, from the situation either of the debtor or of other parties, to prevent the creditor from coming upon the debtor.

PATTESON J. If this had been a motion for judgment non obstante veredicto, it could not have succeeded unless the plea had been bad on its face, admitting the facts alleged. But, on this motion, the objection is, that the plea states facts which the defendant was bound to prove, and did not prove. Some facts at least are traversed: the onus, therefore, was on the defendant; and he has given no proof. Consequently the rule must be made absolute. It is clear that the fact of the *Scotch* law is put in issue. The plea speaks of the *Scotch* law throughout, and concludes with the allegation that the proceedings were pursuant to and in conformity with

(a) See *Garrard v. Woolner*, 8 Bing. 258: *Reay v. Richardson*, 2 C. M. & R. 422; *S. C.* 5 Tyrwh. 931. It was not alleged in the present plea, nor did it appear on the pleadings, that the bill was made or accepted in *Scotland*. See *Phillips v. Allan*, 8 B. & C. 477.

the

the laws of *Scotland*, whereby, and by reason of the said several premises, and by effect of the aforesaid laws, the defendant has become absolutely discharged; and the replication traverses the discharge modo et formâ. The replication, therefore, puts the *Scotch* law in issue, and that is a matter of evidence. But then it is said that all relating to the *Scotch* law may be rejected, and that the plea may be taken as shewing a discharge by the *English* law. I doubt that, upon a record thus framed. Here is a traverse: can you reject the traverse, and say that the matter traversed is unnecessary? But, even if that could be done, it is clear that the plea shews no defence by the *English* law: for it is not alleged that the plaintiff either executed the deed of composition, or said that he would do so, or induced others to do so; but only that he nominated and appointed a person as his attorney, and authorised and empowered him to concur in and adopt the deed, and that such person did adopt the deed on behalf of the plaintiff. The law of *England* has no such phraseology, although a man may be estopped by acting under a deed. There is no averment here to shew that the defendant was put by the plaintiff in an altered situation, according to the *English* law, or that other creditors came in under circumstances which would make it fraudulent in the plaintiff to proceed for his debt. The discharge, therefore, which is traversed, is a discharge by the *Scotch* law.

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 against
 EDWARDS.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

1836.

Thursday,
November 24th.

The KING against EVE and PARLBY.

D. obtained a rule nisi for a criminal information against the publishers of a libel, on his affidavit that the imputation in the libel was false. The Court discharged the rule, on the sole affidavit of *S.*, who deposed that the imputation was true. Afterwards *S.* made declarations, and depositions in an ecclesiastical suit (but not, apparently, material to such suit), contradicting his affidavit in all particulars. *D.* then indicted *S.* for perjury, and the bill was found, but *S.* left the country. In the term after *S.* had made the declarations and depositions, and after he had gone away, *D.* obtained another rule for a criminal information against the publishers, on affidavit of the above facts, and of his innocence as before. In answer, affidavit was made that *S.* gave the information, after the publication, voluntarily, and that the deponent then and now believed such information to be true; but no affidavit was made as to information or belief at the time of the publication.

The Court, under the peculiar circumstances, made the rule absolute.

IN Trinity term last, *Wightman*, on behalf of *Simon Digby*, obtained a rule nisi for a criminal information against the defendants, for publishing a libel in a *Sunday* newspaper, of May 29th, 1836, called *The Satirist and the Censor of the Time*, in the following words: — “*Simon*, but more commonly known in the play world, as ‘King’ *Digby*, from his skill in ‘palming’ that card at *écarté*, and who long enjoyed an unenviable notoriety among the legs at the club at *Brighton*, is living in obscurity in *Devonshire*. He has been, however, recently in town, and was seen at *Epsom* during the races, *sharp-ly* upon the look-out, it was presumed, for *flats*.” In support of the rule, *Digby* made affidavit that he never was guilty of palming the King at “*écarté*,” nor of unfair play at cards or any other game; and that he had not been at *Epsom* races since 1829. The only affidavit in opposition was that of *Thomas Shepard*, described, in the title of the affidavit, as of *Frederick Street, Hampstead Road, Middlesex*, who deposed that he was intimately acquainted with *Digby*, and that, on one occasion when *Digby* dined with the deponent at the deponent’s then residence in *Shaftesbury Terrace, Pimlico*, *Digby* played at *écarté* with him, won of him from 80*l.* to 85*l.*, was detected by him, while at play, in palming the King, confessed the fact, and returned the money.

On

On these affidavits, this Court, in *Trinity* term last, discharged the rule.

1836.

The King
against
Evil.

In this term, Sir *John Campbell*, Attorney-General, obtained a rule nisi for a criminal information against the defendants, for the libel before complained of. In support of the rule, *Digby* made affidavit that all the statements in *Shepard's* affidavit respecting the deponent were false; that the deponent had never seen or heard of *Shepard* up to the time of reading his affidavit; denying, as before, the charge in the libel; that, immediately after the previous rule was discharged, he proceeded to make inquiry concerning *Shepard*; that, having learned that a person of the name, and answering to the description of him, was to be examined on the 16th of *June* last in a cause in the Consistory Court in *London*, at the office of a proctor, he went thither on that day, and, without mentioning his own name, addressed the person in question, who then denied all acquaintance with him; that, at his suggestion, the same person was interrogated on the subject, in the cause, and, in answer to such interrogatories, swore that he did not know the party who had addressed him as above, that he never resided in *Frederick Street, Hampstead Road*, nor in *Shaftesbury Terrace, Pimlico*, that he had no knowledge of the previous proceedings on the libel, except from reading them in a newspaper, that he was not the person who had made the affidavit in those proceedings, that he did not know *Digby*, and had never dined in his company, nor played at cards with him at *Shaftesbury Terrace* or elsewhere, and, that he never was in his company at all. There were affidavits identifying this *Shepard* with the person who made the affidavit upon which the
previous

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previous rule was discharged, by means of the signatures to that affidavit, and to the deposition in the Consistory Court; and an affidavit identifying the person who made the deposition in the Consistory Court with a *Thomas Shepard* who had resided at *Shaftesbury Terrace, Pimlico*. *Digby* also deposed that he had preferred an indictment for perjury against *Shepard* at the Central Criminal Court, in *August* last, after his deposition in the Consistory Court; and that the bill was found, on the deponent's oath denying the truth of the statements in *Shepard's* affidavit, and on the testimony of several other witnesses; that he had obtained a warrant from the Lord Chief Justice for the apprehension of *Shepard*, which was put into the hands of an officer, but the officer had not been able to find *Shepard*; and that he was believed to have left the country. There were also affidavits of several noblemen and gentlemen, deposing to the integrity of *Digby*, and to their disbelief of the charges in the libel, and in *Shepard's* affidavit.

In opposition to the rule, an affidavit was made by an attorney (not employed as such on this or the former proceeding), that, after the first rule nisi was obtained, he made inquiries in quarters where he thought it probable that information could be obtained, to enable the proprietors of the newspaper to shew cause; that *Shepard* (of whom he had no previous knowledge) had called on him, and given him the information from which *Shepard's* affidavit was afterwards prepared; and that, after the interview, the deponent had satisfied himself by inquiry that a person, answering to the description and name of *Shepard*, had resided in *Shaftesbury Terrace, Pimlico*, and was at the time residing in *Frederick Street, Hampstead Road*; that he did then,
and

and still, believe that *Shepard* had stated nothing but truth in his affidavit; and that no persuasion or control had been exercised over *Shepard* to induce him to make the affidavit.

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Evz.

Thesiger and *Kelly* now shewed cause. There is no pretence for saying that the affidavit on which the rule was originally discharged was not the affidavit of the party in whose name it was professedly sworn: indeed, the prosecutor insists on the identity. The question, therefore, is whether the Court, having once discharged a rule upon affidavit, will afterwards permit the question to be opened, on a suggestion that such affidavit was false. There is no precedent for such a proceeding; and it would be very dangerous to create one. The prosecutor insists that *Shepard* is perjured. It is as likely that the perjury was committed in the case in the Consistory Court, as on shewing cause against the rule for a criminal information; indeed the former is the more probable, as the depositions in the Consistory Court, so far as they relate to the question now before this Court, do not appear to be sufficiently material to admit of perjury being assigned upon them: whereas the affidavit was sworn under a direct liability to a prosecution for perjury, if it was false.

Sir *John Campbell*, Attorney-General, with whom were *Wightman*, and *J. W. Smith*, contra. The defendants do not even now swear that, when they published the libel, they believed it to be true. The Court having refused the prosecutor his remedy, on the affidavit of a party who now appears, upon any supposition, to be
unworthy

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against
EVE.

unworthy of belief, and who is beyond reach, the prosecutor now asks to be put in the situation he would have stood in if no such affidavit had been sworn. (He was then stopped by the Court.)

Lord DENMAN C. J. The Court will always feel very jealous when an application is made to re-open a rule on the ground that the affidavits on which it was discharged were false. But the circumstances of this case are so peculiar, that there is no fear of our creating an improper precedent by making this rule absolute. A party, who has been most grossly calumniated as a swindler, vindicates himself from the charge, so far as to satisfy the rule which this Court lays down in cases of applications for a criminal information; but he is met by the affidavit of *Shepard*, who swears to the truth of the charge. Afterwards it appears that *Shepard* has sworn falsely in all respects, and has fabricated the whole history. That being made probable to us, the publishers are called on to shew cause why the rule, having been discharged upon an affidavit which was apparently a perjury, should not be revived. They do not, in answer, say that they had any other information, leading them to believe that the charge was true, at the time of the publication; nor even that, at that time, they had the information from *Shepard* himself; but only that, after the publication, a person obtained the account from *Shepard*. There is every reason to believe that that account was false. I think, therefore, that the circumstances are quite peculiar enough to enable us to say that we are not likely to create a dangerous precedent by granting the rule.

PATTESON

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

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Rule absolute (a).

The KING
against
EVV.

(a) For the general practice on this subject, see *Rex v. Smithson*, 4 B. & Ad. 861., as to criminal informations. As to other matters, *Davies v. Cottle*, 3 T. R. 405., and *Phillips v. Weyman*, 2 Chitt. Rep. 265. ; to which the following case may be added.

(a) *BODFIELD against PADMORE.*

Monday,
June 13th,
1836.

Crowder had obtained a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the marshal, and a mortgage deed held by the plaintiff be delivered up. A rule to the same effect had been previously obtained (in *Michaelmas* term last), and subsequently discharged; and the facts deposed to in support of the present rule had occurred before the former rule was obtained; but it did not appear that they had then been brought before the Court.

Busby now shewed cause, and contended that, inasmuch as it was not suggested that the facts now insisted upon had come to the defendant's knowledge since the obtaining of the former rule, and as they had occurred before, the defendant could not raise the question anew.

Crowder, contra, contended that, as the facts had not been before the Court on the former occasion, the defendant could not be bound by a decision not affecting the merits of the present case.

Lord DENMAN C. J.- It is impossible to re-open this question. If a party have proper materials at the time of his first application, and be not in a state of ignorance, he is not to make a new application because he did not bring them forward at first. Nothing could be more dangerous.

Where a rule had been obtained to discharge a party out of custody, and had been afterwards discharged, the Court refused to entertain the same question on a subsequent application, founded upon facts which had occurred before the previous rule was obtained; it not appearing that the party applying was then ignorant of the facts, though they were not then brought before the Court.

LITTLEDALE, PATTESON, and WILLIAMS, Js. concurred.

Rule discharged.

1836.

Thursday,
November 24th.

The KING *against* The Churchwardens and
Overseers of WESTOE.

The Court will not grant a mandamus, calling upon parish officers, appellant against an order of removal, to produce the pauper's indentures of apprenticeship (sworn to be in their custody), at the instance of the respondents, in order that an assignment thereon indorsed may be stamped, so as to be evidence on the hearing of the appeal.

CRESSWELL, in this term, obtained a rule nisi for a mandamus, calling upon the churchwardens and overseers of the township of *Westoe*, in the county of *Durham*, to produce to the commissioners of stamps a certain indenture or instrument in writing, purporting to be an indenture of apprenticeship between parties named in the rule, in order that a stamp might be affixed upon a certain deed poll or instrument of assignment indorsed on the said indenture, so that the said indorsement might be read in evidence at the hearing of an appeal now depending between the township of *Scarborough*, in the North Riding of *Yorkshire*, and the said township of *Westoe*; or otherwise to give up the said indenture of apprenticeship, for the purpose aforesaid, to the churchwardens and overseers of *Scarborough*, or their attorney. *Westoe* had given notice of appeal against an order of justices removing a pauper to that township from *Scarborough*. On the pauper's examination it appeared that he had been bound to a person in *Westoe*. The attorney for the parish officers of *Westoe* had the indenture in his possession; it having been obtained (in what manner did not appear) from the master of the apprentice. It purported to bind the pauper to a person in *North Shields*, and was duly stamped and executed; but on the back of it was an indorsement purporting to be an assignment of the pauper to a master in *Westoe*, with whom the pauper had served; that indorsement

was

was duly executed, but not stamped. Possession of the indenture had been demanded, on behalf of *Scarborough*, for the purpose of stamping, but refused. The sessions respited the appeal to give time for making the present application.

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The King
against
The Church-
wardens of
Weston.

Bliss now shewed cause. The overseers are unwilling to furnish evidence against the township for which they are trustees, unless the law requires them to do so. The application is new; it calls upon them, not merely to produce a document for inspection, but to give up the control of it for the purpose of stamping. If this were simply a motion for a mandamus to allow inspection, the Court would not grant it. This is evident from *Rex v. The Bishop of Ely* (a), and the authorities there cited. Lord *Tenterden* said in that case, "The books of a corporation are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also are parish books; but a bishop's register of institutions is kept for the use of all persons claiming title to livings in his diocese. It, therefore, differs from the others, and is of a public nature." On that ground the mandamus was granted; had such ground been wanting, the writ would not have issued; *Cox v. Copping* (b), *Rex v. Smallpiece* (c). In *The Mayor of Southampton v. Graves* (d) this Court held that a mandamus calling on a corporation to allow an inspection of their books by a stranger ought not to be granted, although there were several recent instances in which this had been done. But the demand to have a document given up for the purpose of

(a) 8 B. & C. 112.

(b) *Ld. Ray.* 337.(c) 2 *Chitt. Rep.* 288.

(d) 8 T. R. 590.

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—
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against
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wardens of
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being stamped is still more objectionable. If a mandamus were granted here, a party might in the same manner be required (at whatever risk to his own estate) to produce his title deeds in any settlement case where a question arose upon which those deeds might be thought to bear. But this cannot be demanded by persons who are not parties to such deeds, or interested in them. *Ratcliff v. Bleasby* (a), *Lawrence v. Hooker* (b), *Cocks v. Nash* (c), *Travis v. Collins* (d), *Bateman v. Phillips* (e), shew the description of interest requisite to authorise such a demand; the advantage which persons may derive, as parties to an appeal, from the production of a particular document in evidence, is clearly not such an interest. It cannot be said that the officers of *Westoe* hold this document as trustees for any party but their own township. Besides, the Court will not, for this purpose, notice trusts, except in suits actually before it. In *Cocks v. Nash* (g), *Alderson B.* says, "The practice has been to compel a party to the suit to produce a document required by the adverse party, where both have an interest in the same document; and this, in order that the suit may proceed; — that the adverse party may not have an obstacle thrown in his way." "Over trustees as trustees, this Court has no jurisdiction." Then, if the case is not one in which the Court will interfere as in the exercise of its ordinary control over a suit, but the parties are obliged to ask for a mandamus, they must found themselves on a legal right. Here that right must be grounded on a service under the very assignment in question; but, the

(a) 3 Bing. 148.

(c) 9 Bingh. 723.

(e) 4 Taunt. 157.

(b) 5 Bing. 6.

(d) 2 Cro. & Jer. 625, S. C. 2 Tyrwh. 726.

(g) 9 Bing. 727.

assignment

assignment not being stamped, the service is as if it had never taken place. The defect in the instrument removes the foundation of their claim; the case is in this respect like *Jackson v. Warwick* (a), *Aldridge v. Ewen* (b), and *Hunt v. Stevens* (c). Further, it does not appear when the assignment was executed; if before the passing of stat. 44 G. 3. c. 98., it could not now be rendered valid by stamping, *Rex v. Chipping Norton* (d). And it is an additional reason for refusing this application, that it may subject third parties to penalties, under the revenue laws and otherwise, *Lawrence v. Hooker* (e), besides other liabilities to which the production of such a document might possibly expose them. If it be alleged, as a ground of the application, that it calls on public officers to discharge a public duty, that argument applies only to such duties as the office properly calls on them to fulfil. And the objection before urged would still apply, that the claimant does not shew an interest in himself, or a legal right.

Cresswell, contra. The question is, not whether the instrument, if produced, could be rendered available, but whether the officers of *Westoe* are entitled to withhold it. The ground upon which a mandamus was granted in *Rex v. The Bishop of Ely* (g) was that the register was a public document, and ought to be open for the use of all persons claiming title to livings in the diocese. The same argument applies here. Paupers are maintainable by parishes according to certain conditions

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—
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Weston.

(a) 7 T. R. 121.

(b) 3 Esp. N. P. C. 188.

(c) 3 Taunt. 113.

(d) 5 B. & Ald. 412. But see *Rex v. Ide*, 2 B. & Ad. 866.

(e) 5 Bing. 6.

(g) 8 B. & C. 112.

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prescribed by law; and the question of settlement, under that law, is a public question. Having then in their possession a document relating to the settlement of a pauper, they are bound to produce it at the request of any person having an interest in that fact. They have possessed themselves of the evidence on a question of public right; and they resort to a technical difficulty to excuse themselves from producing it. In *The Mayor of Southampton v. Graves (a)* the application was to inspect documents in which the corporation had an interest like that of a private party in his title deeds. Lord *Kenyon* said there, "Corporations, like individuals, have their rights and estates;" "but according to the doctrine now relied upon by the defendant, in every case where a corporation are parties to a suit, an inspection of their writings is to be granted of course. Where indeed the dispute is between different corporators, there an inspection of the writings belonging to the corporation may be granted, because each party has a right to see them: but I cannot conceive why an inspection of the muniments of a corporation should be granted when a similar inspection would be denied if the suit were between private persons only." But this writing is not a muniment of the parish officers of *Westoe*; if subpoenaed to produce it, they could not withhold it on that ground. If a mandamus does not issue, injustice must be done. It is not denied that there was an indenture, an assignment, and a service in *Westoe*; but, if this document cannot be made a subject of proof, *Scarborough* must maintain the pauper. If, when the instrument has been stamped, the officers of *Westoe* can shew that it ought

(a) 8 T. R. 590.

not to be produced in evidence on the hearing of the appeal, they may allege their reasons hereafter: and it will then become a question whether or not secondary evidence shall be received.

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Westoe.

LORD DENMAN C. J. I think that a mandamus cannot be granted. Mr. *Cresswell* is obliged to support the application by contending that this is a public document, but we cannot consider it so. No case goes so far.

PATTESON J. The argument as to want of interest in this document is beside the question. Mr. *Cresswell* does not contend that the parish officers of *Scarborough* have an interest in the document, but only that it is of a public nature, which there is no pretence for asserting. It is said that injustice will result from its being withheld: but the public is not concerned, for the pauper must be settled somewhere. The rule must therefore be discharged.

WILLIAMS J. I am of the same opinion. It is impossible to say that this is a public document (a).

Rule discharged.

(a) *Coleridge J.* was in the bail court.

1836.

Thursday,
November 24th.

BALLANTYNE *against* TAYLOR.

Plaintiff held defendant to bail for a debt sworn to be 20*l.* 2*s.* 1*d.* The demand consisted of many items, none exceeding 12*s.* in amount. Defendant pleaded, 1. Part payment. 2. Infancy; and no other plea. Defendant traversed the payment, and rejoined, to the second plea, that the goods were necessaries. On the trial, defendant failed as to the plea of payment, and the judge leaving it to the jury whether the goods supplied were necessaries, the plaintiff had a verdict for 10*l.*, being the whole of his claim for those articles of which he had proved the delivery:

Held, that defendant was entitled to costs under stat. 43 G. 3. c. 46. s. 3., though plaintiff, upon the motion, put in affidavits to shew that goods had been supplied to the whole amount claimed (which defendant, in general terms, denied), and though the affidavits stated that plaintiff's failure to prove his whole demand at the trial was owing to a part of the goods having been delivered by himself.

DEBT for goods sold and delivered, and on an account stated. Plaintiff arrested defendant, and held him to bail for 20*l.* 2*s.* 1*d.* Defendant pleaded, 1. Infancy. 2. Payment of 5*l.* 15*s.* 3*d.*, part of the demand. Replication: 1. That the goods were necessaries: 2. Traversing the payment. Issues thereon. On the trial before Lord Denman C. J., at the sittings in *London* after last *Trinity* term, the plaintiff proved delivery of part of the goods; the plea of payment was not supported; and the Lord Chief Justice left it to the jury whether any part of the goods proved to have been delivered were necessaries, desiring them, if so, to give a verdict for the amount claimed in respect of such goods. The jury gave a verdict for 10*l.* In this term a rule nisi was obtained for costs, under stat. 43 G. 3. c. 46. s. 3.

By particulars, delivered before plea, under a judge's order, it appeared that the action was brought for 25*l.* 17*s.* 4*d.*, minus 5*l.* 15*s.* 3*d.*, admitted to have been been paid in 1831, the items being of various dates, from *September* 1831 to *July* 1834. The articles were gloves, hosiery, cravats, &c., the highest item of charge amounting to 12*s.*, the lowest to 1*s.* 4*d.* The defendant, by his affidavit, denied that at or since the commencement of the suit he owed the plaintiff 20*l.*, and alleged

that

that no bill of particulars had been delivered to him, before the arrest, beyond the amount of 9*l.* 9*s.* 9*d.* The affidavits in answer, by the plaintiff and others, stated that 20*l.* 2*s.* 1*d.* was owing at the time of the arrest, as stated in the particulars, which the deponents confirmed by reference to the plaintiff's books; that (as one of the deponents believed, assigning reasons) accounts of the whole were duly delivered; that defendant's father had paid the 5*l.* 15*s.* 3*d.* on account in 1831, and had then told plaintiff that he must look to defendant for the balance, as his allowance was sufficient to enable him to pay it; that in 1835, plaintiff having written a letter pressing for payment, defendant returned an answer, saying, among other things, "if you think you can recover the bills by law, you had better try it;" that, in consequence of this letter, plaintiff, believing that defendant meant to act dishonestly, instructed his attorney to demand payment, and to arrest, if the application was not attended to; that, at the trial, plaintiff, having delivered many of the articles himself, could only prove his demand as to a part, which his shopman had delivered; that the jury gave a verdict for the whole amount of these; and that the prices were reasonable, and the goods suitable, in quality and quantity, to the defendant's apparent condition in life.

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Sir *F. Pollock* and *Swann* now shewed cause. There was, according to the statute, "reasonable or probable cause" for holding to bail. The plaintiff failed only so far as he was unable to prove the delivery of particular articles. The defendant asserts generally that he did not owe 20*l.* when arrested, but he does not deny specifically the receipt of any article; nor does he say that he

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did not know the amount of the plaintiff's claim, though he denies that any bill of particulars (except as to 9*l.* 9*s.* 9*d.*) was delivered to him before the arrest. On both the issues which he has raised, the verdict is against him. The real question was upon the defence of infancy. There was a *bonâ fide* claim as to the whole amount, with a fair ground of expectation, on the plaintiff's part, that he might succeed; costs therefore ought not to be given against him; *Stovin v. Taylor* (a), *Twiss v. Osborne* (b), *Cawthorne v. Cawthorne* (c). The amount of the verdict is not to govern the discretion of the Court; *Graham v. Beaumont* (d).

Humfrey, *contra*, was not heard.

LORD DENMAN C. J. It has always been held that, in a case of this kind, the amount recovered was *primâ facie* evidence. Here the plaintiff has sworn to an amount just sufficient to authorise an arrest; and I think we cannot say that he had "reasonable or probable cause" to arrest for 20*l.*

PATTESON J. I am of the same opinion; and it is right that parties should understand the risk they run in making affidavit of a debt of 20*l.* when it is but just about that amount.

WILLIAMS J. I am of the same opinion. There is great risk in making an affidavit to hold to bail, where the bill is of such an amount as this, and composed of many small items (a).

Rule absolute.

(a) 1 *Dowl. P. C.* 697. note (a).

(b) 4 *Dowl. P. C.* 107.

(c) 4 *Dowl. P. C.* 182.

(d) 5 *Dowl. P. C.* 49.

(e) *Coleridge J.* was in the bail court.

1836.

The KING *against* The Inhabitants of ABERGELE. *Thursday, November 24th.*

AN order for the removal of certain paupers from the parish of *Abergele* in *Denbighshire* was quashed by the sessions, *April* 1836, on appeal. Notice in writing was given to the chairman and justices, that the respondents intended applying for a certiorari to remove the order of sessions. The notice was under the hand of the attorney employed for the parish. The certiorari was sued out, and was delivered to the justices at the *October* sessions, 1836, together with a recognisance entered into by *W. H.*, of &c., in the parish of *Abergele*, farmer, and *A. W.* of the town of *Abergele*, innkeeper, before a justice of the county, in 50*l.*, with condition that the inhabitants of *Abergele* should prosecute the said writ of certiorari, &c. In this term a rule nisi was obtained for quashing the certiorari, on the grounds, that the notice of applying for the certiorari was not given by the "party or parties suing forth the same," according to stat. 13 G. 2. c. 18. s. 5.; and that the recognisance was irregular, being entered into by two inhabitants of the parish merely as inhabitants, and not by any person or persons in the name of the parish generally, whereas stat. 5 G. 2. c. 19. s. 2. enacts "that no certiorari shall be allowed to remove any such judgment or order" (of justices) "unless the party or parties prosecuting such certiorari, before the allowance thereof,

For obtaining a certiorari on behalf of a parish, to remove an order of sessions, a notice to the justices, signed by the attorney for the parish, stating the intention of the parish to apply for such writ, is a sufficient notice by the "party or parties suing forth the same," within stat. 13 G. 2. c. 18. s. 5.

The recognisance, under stat. 5 G. 2. c. 19. s. 2., for prosecuting such appeal, must be entered into by one or more of the inhabitants on behalf of themselves and the other parishioners, and also by sureties.

Where a certiorari had been allowed on an insufficient recognisance (it being given merely by two persons appearing on the recognisance to

be inhabitants of the parish), this Court refused to quash the certiorari, but quashed the allowance, and enlarged the return to the writ, sending the writ back to the sessions in order that it might be duly allowed, after the parties prosecuting the writ should have entered into a proper recognisance.

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shall enter into a recognisance with sufficient sureties," "in the sum of 50*l.*, with condition to prosecute the same at his or their own costs and charges with effect," &c., and to pay costs, &c. (*a*).

J. Jervis now shewed cause. Notice, under the hand of the attorney for the respondents, of their intention to apply for a certiorari (*b*) was a notice by the parties within the meaning of the statute. [Lord *Denman* C.J. That is a reasonable construction.] *Rex v. The Justices of Cambridgeshire* (*c*) shews that such a notice is sufficient, and not open to the objection taken in *Rex v. The Justices of Lancashire* (*d*). [*Humfrey*, contra, said that this point would not be insisted on.] As to the recognisances, *Rex v. Boughey* (*e*) may be cited on the other side; but there the certiorari was applied for by individuals, who might themselves have been bound. A parish cannot be personally bound; and the respondents here have given two sureties, and that is the

(*a*) It was also objected that the certiorari was not "moved or applied for within six calendar months next after" the making of the order of sessions, pursuant to stat. 15 G. 2. c. 18. s. 5. The order was made, April 7th; but the sessions began on the 5th, and it was contended that the judgment must have relation to the first day. The agent for the respondents went to the chambers of the Lord Chief Justice, October 4th, to obtain a fiat for a certiorari. The Lord Chief Justice was out of town (as were the other judges of this Court); but his Lordship's clerk promised the agent that he would send the necessary papers to the Lord Chief Justice in *Derbyshire* by that evening's post, and desired him to call again on the 8th, that being the first day on which it was probable the papers could be returned. The agent applied again on the 8th, and received the fiat, indorsed by the Lord Chief Justice; after which he immediately proceeded to obtain the certiorari. These facts were commented upon in argument; but the Court laid no stress upon the objection.

(*b*) The notice was described in these terms, in the affidavit on which the rule was granted, and no other account of it was given.

(*c*) 9 B. & Ad. 887.

(*d*) 4 B. & Ald. 289.

(*e*) 4 T. R. 281.

practice

practice in such cases. [Lord Denman C. J. The objection to the recognisances in *Rex v. Boughey* (a) was not necessary to the decision, because the certiorari had been applied for too late.]

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Humfrey, contra. The words "party or parties prosecuting" apply to a parish; the recognisance on its behalf might be entered into by the parish officers: and it would seem, by the language of *Parke J.* in *Rex v. The Justices of Cambridgeshire* (b), that all should enter into it. If two inhabitants, or one, could be said to represent the parish, still there is not a recognisance by the party and sureties. It appears from a manuscript note of *Rex v. Boughey* that one or two inhabitants may become bound on behalf of the parish; but that has not been done here. And whatever the practice may have been, effect ought to be given to the statute, according to its plain words.

(A note of *Rex v. Boughey and Others*, by the late Mr. *Dealtry*, was here submitted to the Court, stating as follows:—"There was an affidavit that, by the constant practice of the Crown Office, a party was not required to enter into recognisances to prosecute the certiorari; if he found two good sureties, it was always considered a compliance with the statute. And in the present case, but particularly in cases where a whole parish were defendants, it was impossible that they could all enter into a recognisance. But the Court determined" "that the statute absolutely required a party removing to enter into the recognisance; and Lord *Kenyon* said, in the case of a parish, one or two of the inhabitants might

(a) 4 T. R. 281.

(b) 3 B. & Ad. 889.

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enter into the recognisance on behalf of the rest, as on an indictment they *plead* in the name of the whole."

The officers of the Crown Office now stated, in addition, that, since the decision in *Rex v. Boughey*, the recognisance in the case of a certiorari to remove orders at the instance of a parish had continued in the same form as before, except that it was altered from sureties by two inhabitants in 25*l.* each, to sureties by two inhabitants in a joint sum of 50*l.*)

LORD DENMAN C. J. The Court is of opinion that recognisances ought to be given here on behalf of the parish, and two sureties also. But nothing limits the time for doing this; and we think the rule ought to be enlarged, in order that the proper recognisances may be entered into. [*Humfrey* suggested that the time was limited by stat. 13 G. 2. c. 18. s. 5.] I do not think the words of that clause have the rigid sense contended for. The statute enacts that no certiorari shall be granted, unless moved or applied for within six calendar months after the making of the order. This was so applied for. Why may not there be an allowance now, if the first allowance is incorrect? It is doing no violence to the act to say so. If the application for a certiorari were made when the six months were expiring, the allowance would necessarily be after the six months. And, by stat. 5 G. 2. c. 19. s. 2., the recognisances are to be entered into "before the allowance" of the certiorari. That relates to allowance merely.

PATTESON J. The allowance is by the persons to whom the certiorari is directed. Here the allowance is said to be irregular, on account of a defect in the recognisances.

nisances. Why should not it go back in order that proper recognisances may be entered into?

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Humfrey contended that, as the case now stood, the allowance being clearly irregular, the appellants were entitled to have the certiorari itself quashed.

J. Jervis. . There is no objection to the writ, though the proceedings for allowing it are defective. When those are amended, the certiorari will come into operation. [*Patteson J.* If a certiorari has been obtained within the six calendar months, but not used for a long time afterwards, it does not therefore become invalid.]

Lord DENMAN C. J. The rule will be moulded so that the allowance may be quashed. When proper recognisances are entered into and another allowanec obtained, the respondents will make what use of it they can.

PATTESON and WILLIAMS Js. concurred (a).

The rule was, that the allowance of the certiorari be quashed, and the recognisances discharged. And, "That the return to the said writ of certiorari be enlarged; and the said writ of certiorari, and the orders returned therewith, be sent back to the sessions, in order that the said writ may be duly allowed, after the defendants shall have entered into a recognisance by one of them the said defendants, on behalf of himself and

(a) *Coleridge J.* was in the bail court.

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the other inhabitants prosecuting the said writ of certiorari, with sufficient sureties, in the sum of 50*l.*, pursuant to the provisions of the statute in that case made and provided."

*Thursday,
November 24th.*

**CROSS against METCALFE, Executor of WILLIAM
METCALFE.**

A cause was referred at nisi prius, and a verdict taken for the plaintiff, subject to a reference. The arbitrator certified to the Court, pending the reference, that it would be agreeable to the justice of the case to allow the plaintiff to amend his replication, by substituting *de injuriâ*, or some other replication which should put in issue all the allegations in the plea.

Held, that such amendment could not be ordered without consent of both parties.

AT the York Spring assizes, 1836, this cause came on for trial; and, by consent, a verdict was taken for the plaintiff for 500*l.* damages, subject to the award of a barrister, to whom all matters in difference in the cause were referred, with power to order a verdict for either party, or a nonsuit, to be entered, and to raise any point of law which the parties or either of them might require. Pending the reference, the arbitrator made the following certificate:— "After hearing all the evidence tendered by both parties, and the arguments of counsel for both parties thereon, I certify respectfully to the Court that I am of opinion that it will be agreeable to the justice of the case to allow the plaintiff to amend the replication to the last plea, by substituting for the present replication the general replication *de injuriâ*, or other replication putting in issue all the allegations in that plea, upon payment of the ordinary costs of the amendment and application for leave to amend, if such an amendment can be ordered to be made in the present stage of the cause." A rule was obtained, in this term, calling on the defendant to shew cause why the plaintiff should not have leave to amend, according to the above certificate,

cate, by substituting the replication de injuriâ for the present replication to the last plea.

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W. H. Watson now shewed cause. There is no authority to make this amendment. The arbitrator is put in the place of a judge sitting at nisi prius; but even a judge had no power to amend during the trial, before the statutes 9 G. 4. c. 15. and 3 & 4 W. 4. c. 42.; and he can do so now only in cases of variance. A misleading cannot be amended at this stage of the cause. If this be in the nature of an application for a repleader, the rule is that a repleader be not granted in favour of the party making the first fault.

Joseph Addison, contra. This amendment is necessary for the purpose of justice; and it is said in 1 *Tidd's Practice*, 713. (a) that, "notwithstanding the general rule, which prohibits amendments not authorised by the above statutes," (of amendments) "after the proceedings are entered on record, the courts, we have seen, have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered on record, and even after a trial has been had thereon, and the plaintiff has been nonsuited, or failed in producing the record. The amendment may be made in any stage of the proceedings." [Lord Denman C. J. Not for the purpose of giving a new defence or reply.] The arbitrator here thinks that the replication takes issue on an immaterial

(a) 9th ed.

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fact in the plea; and he wishes the whole matter of the plea to be put in issue, that the case may be tried on the merits. *Tufton and Ashley's Case* (a), *Tite v. The Bishop of Worcester* (b), *Smith v. Fuller* (c), *Res v. Wilkes* (d), *Richardson v. Mellish* (e), shew the latitude taken in practice, as to the periods at which the courts will allow amendments. In ejectment, it has been common to enlarge the term stated in the demise, after verdict (g). On demurrer, the courts have occasionally permitted material amendments after judgment has been pronounced. In *Hooper v. Manile* (h), which was an action for not carrying away tithes of grass and hay, the declaration alleged the closes in which &c. to have been sown with grass; a new trial was granted on account of a variance, it having been proved that the grass was natural; and afterwards the Court of Exchequer gave the plaintiff leave to amend by striking out the averment on which the variance arose. [*Patteson J.* There is no instance in which the courts have allowed the substance of the issue to be altered after verdict, without setting the verdict aside.] The verdict here is only nominal; it is in fact suspended till the arbitrator awards.

Lord DENMAN C. J. None of the cases approach what is now contended for. It would be going too far to grant it.

(a) *Cro. Car.* 144.(b) 1 *Ld. Raym.* 94.(c) 1 *Ld. Raym.* 116.(d) 4 *Burr.* 2527, 2566.(e) 3 *Bing.* 334.(g) See *Vicars v. Haydon, lessee of Carrol*, 2 *Cowp.* 841; *Doe v. Rendell*, 1 *Chitt. Rep.* 535., and the cases there cited.(h) 13 *Price*, 695, 736.

PATTESON J. The verdict has been taken on a particular issue, by consent. Can we alter the terms on which the verdict was taken and the reference made, without consent?

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WILLIAMS J. If the proposed alteration is a material one, there ought to be a consent of the parties: if it is not material, there is no need of the application (a).

Rule discharged.

(a) Coleridge J. was in the bail court.

1836.

*Wednesday,
November 23d.*

The KING *against* The Commissioners of the Navigation of the Rivers THAMES and Isis.

By acts relating to a river navigation, commissioners were authorised to make such cuts as they should

MANDAMUS. The inducement suggested that, by an act, &c. (stat. 52 G. 3. c. xlvii., local and personal, public), after reciting acts passed in 11 G. 3.

(c. 45.),

deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream; and to make such horse towing-paths as they should think convenient for the navigation. If any person should think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction as they should think reasonable. And, if the party complaining should be dissatisfied with such order, &c., he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents and purposes whatever.

A mandamus recited that *B.* was seized in fee of an ancient towing-path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, dispense with the use of the horses, and withhold the tolls; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from *B.*'s towing-path, and rendered the towing-path, and his exclusive right, wholly unprofitable; that so *B.* was aggrieved, &c.; that he had complained to the commissioners and demanded compensation adequate to the injury which he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination, and judgment that they could not accede to *B.*'s application; that *B.*, being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay *B.* 1000*l.* in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay; and the writ commanded them to pay.

Return, That the commissioners, believing *B.* had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to *B.* that they refused to accede to his application; that *B.*, treating this refusal as an order, &c., appealed; that, on the appeal, the commissioners objected that the refusal was not an order, but the quarter sessions over-ruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that *B.* was no further entitled to the path than as owner of the land; that they had not obstructed his towing-path, nor placed any obstacle to the navigation against the towing-path; that parties might, and sometimes did, still navigate by the old channel. Held,

1. That the refusal of the commissioners was an order, determination, and judgment, from which an appeal lay to the sessions.

2. That the sessions had jurisdiction to award compensation to *B.*, both for the damage suffered by his towing-path being less used, and for the obstruction of the old navigation.

3. That the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the return (assuming it to negative the obstruction of the navigation) did not deny that the sessions had found such obstruction.

4. A peremptory

(c. 45.), 15 G. 3. (c. 11.), 28 G. 3. (c. 51.), and 35 G. 3. (c. 106.), it was enacted (a) that all and every the powers, authorities, provisoes, restrictions, clauses, penalties, forfeitures, matters, and things contained in the recited acts should continue in force for executing the works by the said former acts, and by that act, authorised and directed to be done (except such parts thereof as should be altered, &c., by that act); and the commissioners appointed under the said acts, or either of them, should have power and authority to execute so much of the said acts as should remain in force, and also that act: and that, in and by the said stat. 35 G. 3. (c. 106.), it was enacted (b) that, if any person should think himself aggrieved, damaged, or injured by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint thereof in writing to the said commissioners at any district or general meeting, &c., the said commissioners should hear and report on such complaint to the next or some other subsequent general meeting, and should, at such next or subsequent general meeting, make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction to the party complaining as they should think reasonable; and, if the said party should be dissatisfied with such order, judgment, or determination, it should be lawful to appeal to the next general Quarter Sessions of the county in which the cause of complaint should arise, giving notice, &c., to the general clerk of the commissioners; and the said Court should entertain, and take cognizance of, such appeal, and make such order and adjudication thereon

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4. A peremptory mandamus was awarded to the commissioners to pay the money.

5. But the Court would not give the prosecutor costs of the mandamus, under stat. 1 W. 4. c. 21. s. 6., considering the question to have been very doubtful.

(a) Stat. 59 G. 3. c. xlvii. s. 1.

(b) Stat. 35 G. 3. c. 106. s. 22.

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as to the justices should seem just, and award such costs, &c., which order and determination should be final and conclusive to all intents and purposes whatsoever.

That the Right Honourable *George Lord Boston* hath been for divers years last past, and now is, seised, possessed of, and entitled to, the fee simple and inheritance of an ancient towing path, situate in the several parishes of &c. in the county of *Bucks*, for the towage of barges, and of goods &c., contained therein, up and down the river *Thames*, for a great distance, to wit one mile and two furlongs, to wit (describing the termini, above and below *Cookham Ferry*); and that the said *G. Lord B.* hath been for divers years last past, and now is, seised, possessed of, and entitled to the sole and exclusive right and privilege of towing barges, &c., and goods, &c., to and from &c. (mentioning the termini), taking, for the towing of such barges, &c., with horses kept by him, or by his authority for that purpose, certain reasonable tolls or payments.

And that the commissioners have made, under the authority of the said above recited acts (a), a certain
new

(a) Stat. 52 G. 3. c. xlvii. s. 8., after repealing stat. 28 G. 3. c. 51. s. 16., so far as it gives restricted powers to make cuts and erect locks, enacts, "That it shall be lawful for the said commissioners to erect any lock or locks, pound lock or pound locks, or other device for the improvement of the said navigation from the boundary of the jurisdiction of the city of *London*, near *Staines* in the county of *Middlesex*, to the town of *Cricklade* in the county of *Wilts*; and to make any cut and so many cuts as they shall deem necessary for the said navigation, or for the purpose of erecting or communicating with any lock or locks, pound lock or pound locks on the same navigation: provided nevertheless, that no one cut shall "be made so as to divert or stop up the present or usual channel of the said river, or to turn, divert, or alter the course of the stream or water passing through the same."

Stat.

new cut or canal, from that part of the *Thames* which is opposite *Cliefden* bank, &c., and into the *Thames* again, a short distance below *Cookham Ferry*, by the making of which new cut or canal all persons navigating barges, &c., up and down the river *Thames* are enabled to avoid that part of the said river along which the said towing path of *G. Lord B.* is situate, and to dispense with the use of the horses kept by, or by the authority of, *G. Lord B.* for the towing of such barges, &c., and to withhold the said tolls or payments, &c., for the use of such horses. That the commissioners have also made, under the authority of the said acts, at or near the said new cut or canal, a certain pound lock, at which tolls and payments are, under the said acts, demanded and taken by the commissioners, for the use of the said new cut by barges, &c., whether such barges, &c., shall or shall not have passed through the said new cut. And that the commissioners, by the making of the said new cut, have materially injured the old channel of the river

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Stat. 35 G. 3. c. 105. s. 23., reciting that "it would greatly conduce to the benefit and advantage of the said navigation if a free, continued, uninterrupted, and public, horse towing path were made and established throughout and on the whole of the said navigation, so that barge masters or other persons might employ their own horses or cattle in the towing of barges, boats, and vessels, on the said navigation, either upward or downward, without interruption or impediment;" enacts that it shall "be lawful for the said commissioners to purchase and make any such horse towing paths, roads, and ways, for the haling of barges, boats, and vessels, or for passing from any public road to any horse towing path, as the said commissioners shall think convenient and necessary for the use of the said navigation," &c., with certain exceptions not material here; "the said commissioners paying and allowing unto all and every person or persons full recompence or satisfaction for all such losses or damages as he or they shall or may sustain or be put unto by reason of the taking of such lands or grounds for the making of a towing path, way, or road, for the use of the said navigation;" the damages, if not agreed upon between the parties, to be settled by a jury.

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Thames, and made the navigation of that part thereof, along which the said towing path is situate, less easy and convenient; and that so, by the making of the said new cut or canal as aforesaid, and by the demanding and taking of the said tolls as aforesaid, and by the injuring of the said channel as aforesaid, the commissioners have diverted the navigation from the towing path of the said *G. Lord B.*, and rendered his said towing path, and his said sole and exclusive right and privilege of towing barges, &c., useless and unprofitable to him. And the said *G. Lord B.* has been aggrieved, damaged, and injured by the said work of the commissioners, and by the operation and effect thereof.

The inducement then suggested that the said *G. Lord B.*, being so aggrieved, &c., did, in pursuance of stat. 35 *G. 3. (a)*, make complaint thereof in writing &c., to the commissioners at a general meeting held on 6th *February* 1833, and demanded compensation; and thereupon the said commissioners, at a subsequent general meeting holden on 29th *June* 1833, made an order, determination, and judgment on such complaint, which order, &c., was to the purport and effect following; to wit, "that the said commissioners could not accede to his Lordship's application:" that the said *G. Lord B.*, being dissatisfied with such order, &c., appealed to the next practicable general Quarter Sessions for the county; which court of Quarter Sessions, in pursuance of the last-mentioned act, made an order and adjudication thereon, that the commissioners should forthwith, upon notice of that order, pay to the said *G. Lord B.*, or to *J. B.*, his solicitor, 1000*l.* in full compensation for the injury sustained by him as aforesaid, and the further

(a) Stat. 35 *G. 3. c. 106. s. 22.*

sum of 200*l.* for costs of the said appeal; which sums of 1000*l.* and 200*l.* ought thereupon to have been paid, &c. The inducement then suggested that Lord *Boston* had given notice to the commissioners, and their general clerk, of the order of Sessions, and had applied for payment; but that they had not paid, and still neglected and refused to pay.

The writ then commanded the commissioners to pay or cause to be paid to G. Lord *B.*, or to *J. B.* his solicitor, the said two sums pursuant to such order, &c., or shew cause &c.

Return. That the cut or canal, in the writ described as having been made by order of the said commissioners, according to the provisions of the several statutes in the said writ recited, empowering them to make cuts or canals (*a*), pound locks, towing-paths, and other works for improving and completing the navigation of the said rivers between the points mentioned, was opened on 30th of *October* 1830; that it was not until 31st of *January* 1833 that Lord *B.*, of whom the commissioners had purchased some land towards making the said cut (*b*), applied to them for compensation in consequence of an alleged loss by the disuse of the said path: that the commissioners, believing that his Lordship had no claim to compensation under the recited acts, did not think it necessary to hear any evidence on the subject of his complaint, or the amount of his alleged loss: that, they having notified to his Lordship, through

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(*a*) See *antè*, p. 806. note (*a*). The powers recited in the return were given by different clauses of the several statutes, not affecting (except as above set forth) the points decided by the Court.

(*b*) The statutes empowered them to purchase for the purposes of the navigation, the value to be assessed by a jury, if necessary.

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their general clerk, that the commissioners refused to accede to his application, Lord *Boston*, treating that refusal as if it were an order, determination, and judgment of the commissioners upon his claim, made it the ground of an appeal to the quarter sessions: and that, before the case was heard, the commissioners objected that the said refusal was not an order, determination, &c., against which an appeal lay under 35 G. 3. c. 106., or any other of the recited acts; but the Court overruled the objection. The return then certified that the said cut or canal enables persons navigating the *Thames* to avoid a dangerous curve or bend of the river, &c. (adding circumstances to shew that the navigation was benefited by the cut): that, by making the said cut, the commissioners have not done or caused any injury to the channel of the said river: that Lord *B.* is no otherwise entitled to the said path in the said writ mentioned than as owner of the land through which it passes, and to such part thereof only as passes through his land: that the commissioners have not, by the said cut, or by any other work, obstructed Lord *B.* in the use and enjoyment of the said path, or his wharfs, or other private property, nor have they placed any fence or other obstacle to navigation against the said towing-path, wharfs, or other property of the said Lord *B.*: that, by the effect or operation of the said cut, traders, and others, if they prefer it, are not prevented from navigating the old channel, or from proceeding to or from Lord *B.*'s wharfs, and that some barges still navigate the old channel; but that, even before the making of the said cut, when barges came down the stream so as not to require his horses, nothing was paid to Lord *B.* or his tenants in virtue of any alleged exclusive right of towing

towing barges: that the commissioners do not take toll for barges coming to or from the wharfs by the channel of the river: that the commissioners are not empowered by any of the recited statutes to make compensation for the disuse or abandonment of a towing path, or on account of traders, &c., being enabled by improvement in the navigation to dispense with the horses of any person claiming a supposed exclusive right of towing barges; and therefore, and for the reasons before stated, that the commissioners are not bound, nor by the said acts or any of them authorised to pay, &c.

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A concilium having been obtained, the case was argued in *Trinity* term last (*a*), by Sir John Campbell, Attorney-General, against the return, and Sir W. W. Follett in support of it. The arguments on each side may be fully collected from the judgment of the Court.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*November* 23d) delivered judgment as follows.

This case, of a mandamus to pay Lord Boston 1000*l.*, as compensation for damage arising from the act of the commissioners, and 200*l.* costs, has been long pending, and has been more than once brought under the notice of the Court. On shewing cause against the rule, in *Trinity* term 1834 (*b*), it underwent much discussion, which

(*a*) May 28th, and June 1st, 1836, before Lord Denman C. J., Little-
dale, Patteson, and Williams, Js.

(*b*) Cause was shewn on June 7th, 1834, before Lord Denman C. J., Little-
dale, Taunton, and Williams, Js., by Sir James Scarlett and J. S. Taylor; and Sir John Campbell, Attorney-General, and Winthrop M. Praed, were heard in support of the rule. Besides the points argued on the return, and noticed in the judgment, it was contended, in opposition

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which ended in the writ issuing: to that writ the commissioners have made a return, the sufficiency of which was argued in the last term. After a great deal of deliberation and doubt, we have at length agreed on the judgment we ought to give.

The facts are these. One of the acts done by the commissioners was to cut off a bend in the river, and make a new channel straight across from one extremity of the bend to the other. A towing path belonging to Lord *Boston*, which went beside the ancient bend, was hereby rendered useless, and the channel of the river was supposed to be made less convenient for the purposes of navigation.

For the injury thus sustained, his Lordship applied for compensation to the commissioners, who refused to accede to his demand, and thought it unnecessary to hear any evidence on the subject. Lord *Boston* then appealed to the Quarter Sessions for *Buckinghamshire*, who, after a full hearing, set aside the commissioners' judgment, and awarded a compensation of 1000*l.* for the said injury, and 200*l.* for his costs. The mandamus was to compel payment of these two sums by the commissioners.

The cause shewn by their return was that the damage described was not, within the act of parliament, a grievance; and that Lord *Boston* cannot be considered

to the rule, that, for the non-payment of the money in obedience to the order of sessions, the remedy (if any) was by indictment, not mandamus. On this point, the following authorities were cited: *Rex v. The Treasurer of the County of Surrey*, 1 Chitt. 650.; *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646.; *Rex v. The St. Katharine Dock Company*, 4 B. & Ald. 360. The Court said that an indictment would not give a sufficient remedy. See *Rex v. Jeyes*, 3 A. & E. 420., and the cases there cited.

a party

a party aggrieved. Their argument was that a mere diversion of custom from the owner of a towing path who lets out his horses to be used there can be no more considered as an injury resulting from the act of the commissioners, than could the loss of guests brought upon the owner of an ancient public house by their making a new road cutting off a bend by which the house stood.

We were referred to authorities where a claim somewhat similar was held inadmissible (a). The answer is to be found in the very peculiar language of this act of parliament, which differs altogether from the numerous acts of the same nature which were sent to us after the argument (b).

We might have found little difficulty in deciding that such damage could not give the sufferer the denomination of a party aggrieved. And, though the remedy is provided for the party who *thinks* himself aggrieved, and that question is sent to the Quarter Sessions, yet those words would probably have not been held extensive enough to prevent our judgment that such damage was no grievance. But the clause empowers every one who may think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, to apply for compensation to the commissioners, who are

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(a) On this point, the following authorities were cited: *Rez v. The Commissioners of the Nene Outfall*, 9 B. & C. 875.; *Rez v. The London Dock Company*, ante, p. 163.; *Rez v. The Directors of the Bristol Dock Company*, 12 East, 429.

(b) By the direction of the Court, copies of several local acts were sent to the learned Judges, for the purpose of shewing that (as was contended) there was nothing peculiar in the language of the present act. On this point, the General Turnpike Acts, 3 G. 4. c. 126. ss. 85, 145., and 4 G. 4. c. 95. s. 87., were also referred to.

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to make such order, determination, and judgment thereon as to them shall seem just, and give such satisfaction to the party complaining as to them shall seem reasonable, and, on refusal by the commissioners, the party is to apply to the sessions, who are required to entertain and take cognizance of such appeal, and to make such order and adjudication thereon as to the justices then present shall seem just, and award such costs to either party as they shall think just and reasonable: which order and determination shall be final and conclusive to all intents and purposes.

Lord *Boston* then, thinking himself damaged and aggrieved by the operation and effect of a work made by the commissioners, asks them for compensation, and is refused. On his appeal to the sessions, that court is invested with cognizance of the cause, and enjoined to make such order and determination thereon as to the justices present seems just; a much wider power than merely to assess damages for some recognized injury. Can we say that they have done wrong in deciding that the damage has accrued by the operation and effect of works done by the commissioners? On the contrary, to assert that it has not, would have been a direct untruth in the ordinary sense of the words; and no other sense is attached to them by any clear legal authority (*a*).

Another objection to the mandamus, that the order of sessions included two objects, for one of which the prosecutor was clearly entitled to no compensation, was not much pressed at the bar, but has occupied the at-

(*a*) It was urged, in support of the mandamus, that the series of acts relating to this navigation recognised the towing-paths as property; but, as the judgment of the Court did not turn upon this point, it is not considered necessary to state the clauses.

tention of the Court. For if the 1000*l.* were awarded, partly for the loss of profits from the towing path, and partly for obstructing the old channel, and the latter had certainly not been made out within the meaning of the clause, we were disposed to think that the judgment comprehending both could not have been sustained (*a*). But this objection also is cured by the extensive language of the act.

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The mandamus alleges the obstruction as one cause of complaint, and the loss of profits from the towing path as another; and recites that the sessions gave their compensation for "the said injury:" that must be the twofold injury. The return indeed denies that the channel was at all obstructed (*b*), and states that all who prefer that course may still pursue it. But the sessions must be taken to have found the fact, when they gave compensation for it; and their order to do what to them seems just and reasonable is made final and conclusive. If the sessions did not enquire into that point, the return might have so averred, and an issue of fact might have been raised. The fact of the commissioners asserting the channel not to have been obstructed is quite consistent with the fact of the sessions having adjudged that it was.

Another objection of a technical kind was more relied on, that the jurisdiction of the sessions did not attach, because the commissioners had come to no order, determin-

(*a*) As to a mandamus for purposes, which are partly legal and partly not, see *Rex v. The Church Trustees of St. Pancras*, 3 *A. & E.* 535.

(*b*) Some discussion arose, during the argument, whether the return fully negatived the fact that the navigation by the old channel was rendered less convenient; but Lord Denman C. J. said that, for the purpose of the present argument, it might be assumed that there was such a denial.

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ation, or judgment, from which an appeal would lie (a). On the facts above stated, which appear in the writ and are not denied in the return, we have not the least hesitation in saying that the refusal to accede to Lord *Boston's* application, or to hear any evidence in support of it, was a plain determination that he was not entitled to what he claimed, and consequently a proper subject of appeal.

This is one of a class of cases which has become exceedingly numerous, in which the Court has found itself constrained to give the words of a private act an effect probably never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense. The liabilities thus imposed on themselves by bodies of men are the conditions upon which the public empower them to perform works expected to be beneficial to both contracting parties. We are not at liberty to enquire whether the bargain is reasonable, but are bound to see it executed. Therefore we must award a peremptory writ of mandamus.

Peremptory mandamus awarded.

Afterwards, in *Hilary* term 1837, Sir *J. Campbell*, Attorney-General, obtained a rule, calling upon the commissioners to shew cause why they should not pay to Lord *Boston* his costs of the application to this Court for the mandamus, and also the costs of the writ and other proceedings had thereon, and the costs of this

(a) It was contended, against the mandamus, that it ought (supposing the case within the act) to require the commissioners to make an order, determination, and judgment, or to hear and report. *Rex v. The Justices of Middlesex*, 16 *East*, 310., was cited.

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application. The affidavits in answer stated that the commissioners had no personal interest in the question.

Sir *W. W. Follett*, (with whom was *J. S. Taylor*) shewed cause in *Easter* term, 1837 (*a*). Under stat. 1 *W. 4. c. 21. s. 6.* the costs are in the discretion of the Court: and, this having been a case of great doubt and difficulty, the commissioners acted properly in bringing it to a legal decision. (He was then stopped by the Court.)

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Sir *J. Campbell*, Attorney-General, *contra*. It must be admitted that the question was one of very great doubt: but that is not an answer; the rule which the Court has laid down, as to the exercise of its discretion, is to give the successful party costs, unless he has been guilty of improper conduct.

Lord DENMAN, C. J. That rule applies to cases under stat. 3 & 4 *W. 4. c. 42. s. 31.*, as to giving costs against executors, where it lies on the unsuccessful party to shew a ground of exemption (*b*). But here we are to exercise a discretion; and it is a case in which we all felt that there was great doubt, and in which we regretted the conclusion to which we came. The commissioners would have acted improperly if they had not defended; and we ought not to make them pay costs.

LITTLEDALE, PATTESON, and COLERIDGE Js. concurred.

Rule discharged.

(*a*) May 8th, before Lord Denman C. J., Littledale, Patteson, and Coleridge, Js.

(*b*) See *Farley v. Briant*, 3 A. & E. 839, 861.

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Friday,
November 25th.

FOWELL and Another *against* PETRE.

WRIGHT *against* ELLIOT.

An affidavit to hold to bail, in an action against the drawer of a bill of exchange, is bad if it omit to state the amount for which the bill is drawn, and allege merely that defendant is indebted to plaintiff, in a sum named, for principal monies due on a bill of exchange, drawn by &c. (adding the parties).
Per Lord Denman C. J.

Per Curiam, this objection comes too late, where the party was detained on a capias issued on October 26th, and does not move to be discharged out of custody till November 14th, although no step has been taken by either party in the meantime.

Delay in taking such an objection is not excused by the fact that the party has been in custody ever since.

Semble, per Lord Denman C. J., that, if a Judge is applied to at chambers to discharge on account of irregularity in the affidavit of debt, and refuses to interfere, and an application is afterwards made to the Court for the same purpose, the motion, in point of form, should be, to discharge the Judge's order.

IN the first of these cases, the defendant was detained on a writ of capias issued *October* 26th, 1836. The affidavit of debt stated that the defendant was indebted to the plaintiffs in the sum of 500*l.* "for principal monies due upon a certain bill of exchange," drawn by defendant upon &c., payable to the order of one of the plaintiffs, and by him indorsed to both plaintiffs, which bill had been refused acceptance and payment. *Bagley*, on the 14th of *November*, obtained a rule to shew cause why the defendant should not be discharged out of custody as to this action, on the ground that the affidavit of debt was irregular in not stating the sum for which the bill was drawn. On a subsequent day of the term (*a*),

W. H. Watson shewed cause. First, the application comes too late. The rule of Court, *Hil.* 2 *W.* 4. I. 33 (*b*), is, that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity." In *Sharpe v. Johnson* (*c*) an application

(*a*) *Nov.* 24th. Before Lord Denman C. J., *Patteson* and *Williams* Js.

(*b*) 3 *B.* & *Ad.* 378.

(*c*) 4 *Dowl. P.* C. 324.

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like this was granted more than two months after the arrest: but there the affidavit to hold to bail was a nullity, having been sworn before a person who was not a commissioner for taking affidavits. In *Tucker v. Colgate* (a) it was held that a similar application could not be made when the time for putting in bail above (four days after the return of the writ) had expired. As to the merits of the application; there have been cases in which an affidavit of debt on a bill, not stating the amount for which it was drawn, has been held sufficient (b); but it was determined by all the Judges, in *Brooke v. Coleman* (c), that the amount must be specified; and the same was decided in *Westmacott v. Cook* (d) and *Molineux v. Dorman* (e). The reason, however, which was assigned in the two latter cases, that the debt itself might be below 20*l.*, and the rest of the demand be made up of interest, cannot apply here; for in this affidavit the debt is expressly said to be for "principal monies." [Patteson J. In the case of an affidavit to hold to bail, is the objection too late if made before the party objecting has taken any step amounting to a recognition of the proceedings?] The rule *Hil. 2 W. 4. I. 33* (g) is in the alternative, "unless made within a reasonable time, nor if the party applying has taken a fresh step." In *Firley v. Rallett* (h), where the arrest was on *May* 22d, and a motion was made, on *June* 7th,

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(a) 2 Cro. & J. 489. S. C. 2 Tyr. 496.

(b) See *Hanley v. Morgan*, 2 Cro. & J. 391.; *Lewis v. Gompertz*, 2 Cro. & J. 352. S. C. 2 Tyr. 317.

(c) 1 Cro. & M. 621. S. C. 3 Tyr. 593. (d) 2 Dowl. P. C. 519.

(e) 3 Dowl. P. C. 662. And see, as to this point, *Tidd's New Practice*, 120.

(g) 3 B. & Ad. 378.

(h) 2 Dowl. P. C. 708.

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that the bail bond might be delivered up to be cancelled for a defect in the affidavit to hold to bail, the plaintiff had ruled the sheriff to return the writ, but no step had been taken by the defendant; and it was held that he came too late. [*Patteson J.* There are many instances in which, though a party himself takes no step, yet, if he lies by and suffers the other side to go on, he is held to have precluded himself from taking an objection.]

Bagley, *contra*, mentioned that, in the present case, an application had been made to *Littledale J.*, on summons, taken out, *November 5th*, for the defendant's discharge; and that the case had stood over for the opinion of this Court. [But the affidavit stating this was objected to as inadmissible, and held so by the Court (*a*).] It is not usual to deal strictly with a prisoner as to the time of making an application. The defendant had not taken any step in the cause before making this motion. As to the form of affidavit, the rule, that the affidavit ought to state the amount of the bill, is laid down without qualification in *Brooke v. Coleman* (*b*), and *Molineux v. Dorman* (*c*). And in *Witham v. Gompertz* (*d*), which was also a case arising on the form of an affidavit of debt upon a bill of exchange, the Court of Exchequer insisted upon the expediency of adhering to usual forms.

LORD DENMAN C. J. If the application is not out of time, I think the affidavit is certainly bad. A person is

(*a*) Lord Denman C. J. afterwards intimated that the Judges would inquire of *Littledale J.* whether anything had passed, before him, as to the time of making the application; but it did not ultimately appear whether or not the learned Judge had been referred to.

(*b*) 1 *Cro. & M.* 621. *S. C.* 3 *Tyr.* 593. (*c*) 3 *Dowl. P. C.* 662.

(*d*) 2 *Cro. M. & R.* 736. *S. C.* *Tyr. & G.* 6.

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not to take upon himself to vary the ordinary forms. And I do not know what is meant by "principal monies due upon a certain bill of exchange." The party may even mean expenses. As to the other point,

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In *Wright v. Elliot* a motion was made in this term, November 16th, for discharging the defendant out of custody as to this action, on entering a common appearance. The defendant was arrested on the 23d of August, and had been in custody ever since. He took out a summons, returnable September 27th, to shew cause at chambers why he should not be discharged on entering a common appearance. On the hearing of the summons, Tindal C. J. refused to make any order thereon, and dismissed it. The affidavit to hold to bail stated that the defendant was justly and truly indebted to the plaintiff in 175*l.*, on a bill of exchange, dated 10th June 1836, drawn by Good and Co. on defendant, and accepted by him, for the payment of 100*l.* to the order of G. and Co. one month after date, indorsed by them to Charles Dalrymple, "and by the said Charles Dalrymple paid and delivered to the said James Wright," the plaintiff. The objections were, that the bill appeared to have been indorsed to Charles Dalrymple, specially, and was not stated to have been indorsed over by him; and that it was not stated to be due and unpaid at the time of making the affidavit. It did not appear that any step had been taken since the arrest. On this day,

Busby shewed cause, and contended that the application, not being made in reasonable time, must fail, though coming from a prisoner; *Primrose v. Bad-*

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deley (a). He argued, further, that enough appeared on the face of the affidavit to warrant holding to bail.

Hunfrey, *contra*, cited, on the latter point, *Latreille v. Hoepfner* (b), as shewing the strictness with which affidavits of debt are to be construed; and, on the want of an averment of default by the acceptor, *Crosby v. Clarke* (c). [Lord Denman C. J. mentioned *Phillips v. Turner* (d)] As to the objection of delay in making the application, *Mortimer v. Piggot* (e) furnishes an answer. [Lord Denman C. J. Should not your motion have been to discharge the order of *Tindal* C. J. ?] He made none. [Lord Denman C. J. His refusal was an order. *Patteson* J. mentioned, as to the point of reasonable time, *Firley v. Rallett* (g), cited yesterday in *Fowell v. Petre*.]

LORD DENMAN C. J. We think that in this case, and likewise in *Fowell v. Petre*, argued yesterday, the defendant comes too late. The rules must therefore be discharged in both cases.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rules discharged.

(a) 2 Cro. & M. 468. S. C. 4 Tyr. 370.

(b) 3 Moore & Sc. 800. S. C. 10 Bing. 334.

(c) 1 M. & W. 296. S. C. Tyr. & G. 660.

(d) 1 Cro. M. & R. 597. J. 5 Tyr. 196.

(e) 4 A. & E. 363. note (2). (g) 2 Dowl. P. C. 708.

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PLOMER *against* BALL:Friday,
November 25th.

HUMFREY, in this term, obtained a rule to shew cause why the defendant should not be discharged out of the custody of the marshal as to this action. The defendant stated, in his affidavit, that he was in the custody of the Sheriff of *Middlesex*, *March* 3d, on a ca. sa. at the plaintiff's suit, for 95*l.*; that a Judge, on summons, ordered him to be discharged on the ground of irregularity; and that, on *July* 16th, he was taken by the Sheriff of *Middlesex* on the same writ of ca. sa. and for the same sum, and was now in custody on that writ. The plaintiff's attorney made affidavit, in answer, that the defendant, on the former occasion, was taken under colour of the writ, but not on the writ, for that the defendant applied before a Judge for his discharge on the ground (which the deponent believed to be true) that the officer had arrested the defendant illegally, not having had in his possession a warrant from the sheriff on the said writ at the time of such arrest; and that, upon this ground solely, the learned Judge made the order for the defendant's discharge.

A party who has been arrested under colour of a ca. sa., but discharged by a Judge's order, on the ground that the sheriff's officer had no warrant at the time of the taking, may be arrested again under the same writ.

Peacock now shewed cause, and contended that the defendant might legally be arrested on the 16th of *July*, for that, on the former occasion, there was no arrest; and he cited *Barratt v. Price* (a).

(a) 9 Bing. 566.

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Humfrey, contra. The discharge of the defendant from a detainer in *Barratt v. Price* (a) is no authority against this application. The defendant there, as in the present case, was taken under the writ, though the officer was not furnished with that which would have justified him in the taking, namely the sheriff's warrant.

LORD DENMAN C. J. The facts are too plain in this case to raise any question. The defendant was clearly not arrested under the writ upon the former occasion.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged.

(a) 9 Bing. 566.

Friday,
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OHRLY *against* DUNBAR.

Sixty-five actions being brought by one party, on policies of insurance, against individual underwriters and incorporated companies, for sums amount-

THE plaintiff effected insurances, by six policies, to the amount of 27,200*l.* on the ship *Pylades*, which was lost in *January* 1835. He gave notice of abandonment in the same month, and, in *April* 1835, brought sixty-five actions upon the policies, against various companies and individual underwriters, claiming as for a

ing in the whole to 27,200*l.*, the defendants obtained a consolidation rule, which by its terms bound the plaintiff as well as the defendants. One cause was tried, the plaintiff had a verdict, and a rule nisi was granted for a new trial, on affidavit of surprise and of merits. From the state of the new trial paper, it was expected that cause could not be shewn for a very long time; two of the defendants had lately died; and the plaintiff alleged that, while the cause stood over, he lost the interest of the 27,200*l.*

The Court would not, on these grounds, direct the amount insured to be paid into court, or invested, to wait the event of the cause in which a rule nisi had been granted.

total

total loss. The action against the present defendant was for 300*l*. An order was made in all the other actions, *June* 22d 1836, that, upon submission of *the plaintiff* and the defendants in the last-mentioned actions to be bound and concluded by the verdict to be given in this (if the Judge should be satisfied therewith), all further proceedings in the last-named actions should be stayed, the defendant admitting his subscription, and the interest as averred. The present cause was tried, and the plaintiff had a verdict; but, in this term, the defendant obtained a rule nisi for a new trial, on affidavits stating surprise, and other grounds of fact for setting aside the verdict. The plaintiff thereupon moved for a rule to shew cause why the defendant should not pay into Court the loss on the ship *Pylades*, or invest the amount according to the direction of this Court, or why the rule for a new trial should not be discharged. The affidavits stated, as grounds for this application, that, from the heavy arrear of causes in the new trial paper, the rule obtained by the defendants could not, in all probability, come on for argument for a very long time; that rules for new trials, granted in *Michaelmas* term 1835, were still in the paper for hearing; that the assured had already sustained a very large loss of interest on the sum insured; and that two of the underwriters were lately dead. Other statements were added, as to the fairness of the plaintiff's proceedings in commencing this action, and the merits of the cause in other respects.

1836.

 ONLY
 against
 DUNBAR.

Sir *J. Campbell*, Attorney-General, and *Maule*, now shewed cause. No sufficient reason is given for departing from the usual practice. There is no suspicion of insolvency, or imputation of misconduct, nor is any

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indulgence

1886.

Quint v.
against
DUNBAR.

indulgence sought by the defendants. It is now settled that a consolidation rule does not bind the plaintiff (a): nothing, therefore, prevents a trial of any of the other actions while this is depending; and the defendant has no objection to that course being taken. There will not necessarily be any loss of interest; because the jury, if they think proper, may give interest from the time when the debt was payable, by stat. 3 & 4 W. 4. c. 42. s. 28. The possibility of deaths might be urged in most cases; but less properly in this than in many others, because several of the policies here are subscribed by incorporated companies.

Sir *W. W. Follett*, and *Alexander*, contra. Whatever may be the effect of an ordinary consolidation rule, the plaintiff, under this, is bound in express terms. The rule was obtained by the defendants. No blame is attributable to the plaintiff; the delay is caused by the proceedings on the other side. In the mean time parties are receiving interest to a large amount on the sums insured; and, the actions being so numerous, the plaintiff runs a more than common risk of losing some of the interest and principal, in consequence of death or insolvency. It is true that some of the policies are effected with incorporated companies; but the plaintiff is willing that the rule should be limited to the actions not brought on such policies. It is not desired to introduce any change in the general practice; the facts of this case are peculiar.

(a) *Doyle v. Douglas*, 4 B. & Ad. 544.; *Long v. Douglas*, 4 B. & Ad. 545, note (a); *Doyle v. Anderson* and *Doyle v. Stewart*, 1 A. & E. 635.

Lord DENMAN C. J. The remarkable circumstances of this case induced us to grant a rule to shew cause: we have now heard the rule discussed; and I am of opinion that, if we complied with applications of this kind on account of special circumstances, we should introduce greater delay than that which now arises from the state of the papers. All parties have, unfortunately, to suffer some delay; but we cannot consider such an application as this with reference to the state of business before the Court.

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Order
against
Denish.

PATTESON J. I am of the same opinion. The delay arises here, not because there is a consolidation rule, but because a new trial is granted.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

E. P. BASTARD, Esquire, *against* SMITH and Others.

Friday,
November 25th.

TRESPASS, for cutting a watercourse through plaintiff's lands in the parishes of *Ashburton* and *Buckland in the Moor, Devonshire* (a). The defendants

The Court will not, under the new rules, permit the following pleas to be pleaded

together, to a declaration in trespass: — 1. A custom for all tanners in the stannaries to make trenches in any lands for conveying water to any stannary worked by them, for the better working of the same. 2. The like, alleging the custom to be on making reasonable compensation.

(a) An injunction had been obtained by the plaintiff against some of the defendants, to restrain them from proceeding with the alleged trespasses; and, on motion, afterwards, to dissolve the injunction, the Lord Chancellor continued it, but ordered that the plaintiff should be at liberty to bring an action of trespass against the present defendants, to try their alleged right to enter the lands and make a watercourse therein.

670 1

applied

1836.

 BASTARD
 against
 SMITH.

applied to *Coleridge J.*, on summons, for leave to plead two pleas: first, justifying the trespass under a custom for all stanners and tanners in the stannaries to make trenches in any lands for conveying water to any stannary worked by them, for the better working of the same; secondly, the like plea, but alleging the custom to be on making a reasonable compensation for the injuries done. The learned Judge refused permission to plead more than one plea. *Erle*, in this term, obtained a rule to shew cause why the two pleas should not be pleaded.

Sir *W. W. Follett*, and *M. Smith*, now shewed cause. By the *General rules and regulations*, *Hil. 4 W. 4.*, 5. (a), several pleas are not to be allowed, "unless a distinct ground of answer or defence is intended to be established in respect of each." And the examples there given are analogous to this case. [*Coleridge J.* I thought that this was, in effect, pleading a custom with and without a qualification.] *Jenkins v. Treloar* (b) is a direct authority, in principle, against the rule. A custom is supposed to originate in a grant; these pleas would state the same grant in different modes. The defences, in several pleas, ought now to be distinct in point of fact; in these pleas they would not be so.

Erle, contra. The customs of the stannaries have been much before the Court of Exchequer of late, and have been considered not so much in the light of local customs as of common law applicable to those districts. And, supposing the customs to originate in grants, there may have been different grants from several persons;

(a) 5 B. & Ad. ii. (b) 1 M. & W. 16. S. C. *Tyrwh. & G.* 316.

the earlier without, the later with, a qualification. [*Cole-ridge J.* You propose to set up these two customs as concurrent.] The defendants have a large body of evidence as to each. They may co-exist. To refuse the rule may occasion a second trial at great expense.

LORD DENMAN C. J. The case falls expressly within the new rule of pleading. We have not power to grant the permission.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged/(a).

(a) The first plea was retained, and, on the trial, the Jury found against the custom.

ROXBURGH *against* CRESSWELL, ASDELL, and
DEVINE.

Friday,
November 25th.

THIS was an action on a bail-bond, against the principal and two bail. The defendant *Cresswell* was arrested *September* 21st. On the 28th he took out a summons for time to put in special bail, returnable on the 29th; no Judge then attending, a second summons was taken out for the 30th, but on that day bail were put in, and notice thereof given to the plaintiff. The plaintiff excepted; and *Cresswell* gave notice that the bail would justify on *October* 10th. The plaintiff attended at a Judge's chambers in pursuance of the notice; but

Defendant, having been arrested, and executed a bail-bond, obtained a summons for time to put in bail above. Pending the summons, but more than eight days after the arrest, he put in bail, who were excepted to, and did not appear on the day of justifi-

cation, whereupon the plaintiff, on that day, took an assignment of the bail-bond; after which, on the same day, the bail above, whose names continued on the bail-piece, rendered the defendant.

Held, that they might do so; and, the plaintiff having served a writ of summons in an action on the bail-bond, the Court set it aside.

At the time when the writs were served, there had been no affidavit made of notice of render having been given, nor had an exoneretur been entered on the bail-piece: Held, that these steps were not necessary for the purpose of exonerating bail to the sheriff, bail above having been put in, and a render made.

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against
CRESSWELL.

no one appeared for the purpose of justifying; whereupon the plaintiff, on the same 10th of *October*, took an assignment of the bail-bond, and issued writs of summons in this action. Afterwards, between three and four o'clock on the same day, notice was served upon the plaintiff that *Cresswell* had rendered, which was the fact. On summons before *Bosanquet J.*, the writs issued on the 10th were set aside as premature; and on *October* 13th the plaintiff issued fresh writs. A summons was then taken out on behalf of the sheriff's bail, *Asdell* and *Devine*, to shew cause before *Coleridge J.* why the writs should not be set aside for irregularity. The plaintiff, on the summons, justified issuing the writs, on the ground that the render was irregular: first, because the sheriff's bail (as the plaintiff alleged) had rendered, without putting in bail above; secondly, because no affidavit had been made of notice of render; thirdly, because no exoneretur had been entered. The learned Judge was of opinion that the condition of the bail-bond had been complied with by the putting in of bail on behalf of the defendant, and the subsequent render, which was equivalent to a justification of bail; and that the other steps pointed out were not necessary for exonerating bail to the sheriff: and he set aside the writ against *Devine*; the case of *Asdell* (against whom a distringas had issued) not being at this time gone into. *Humfrey* in the present term obtained a rule to shew cause why the order of *Coleridge J.* should not be rescinded.

Erle now shewed cause. Bail above were put in, whether by the sheriff's bail or by the defendant is immaterial; in either case the render was authorised. It took place within the time limited for justifying bail; and the plaintiff had notice of it. Every thing has been done

done which is necessary for exonerating bail to the sheriff.

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CRESSWELL.

Humfrey, contra. Supposing that, if the bail had originally been put in at the proper time, the render would have been authorised, yet, in this case, an extended time having having been obtained for putting in bail, and no justification having taken place, it is as if no extension of time had been obtained; *Rex v. The Sheriffs of London* (a). [Coleridge J. It would seem that, in that case, bail must have been put in, and the time given expressly for the purpose of justifying. Patteson J. Your difficulty here is that, by excepting, you have shewn that you considered bail to be put in.] That admission was made only in the event of their justifying. In *Rex v. The Sheriff of Middlesex* (b) it was held that contempt by the sheriff in not bringing in the body was not purged by a render subsequent to the contempt though before attachment issued.

PATTESON J. (c) The rule is that bail, as long as they remain on the bail piece, may render their principal, and that, even if they have been rejected (d). Here the defendant was rendered by bail remaining on the record, and notice of render was given to the plaintiff. The statement in *Rex v. The Sheriffs of London* (a) is evidently inaccurate. In the present case it is clear that there was an extension of time for the purposes both of putting in and of justifying bail; bail were put in, and they did not justify, but rendered, which they might have done, even if rejected in open Court, so long as

(a) 1 Chitt. Rep. 567.

(b) 8 T. R. 29.

(c) Lord Denman C. J. was not in Court.

(d) Reg. Gen. Hil. 2 W. 4. I. 20, 3 B. & Ad. 377.

they

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they remained upon the bail-piece. The rule must therefore be discharged.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

Friday,
November 25th.

In the Matter of The Mayor of HYTHE.

On the revision of a burgess list, under stat. 5 & 6 W. 4. c. 76. s. 18., the mayor expunged a name. In the succeeding mayoralty, before fresh assessors were elected, application was made for a mandamus to restore the name, on a suggestion that the objection was invalid.

Held (before stat. 7 W. 4. & 1 V. 78.), that this Court had no power to grant such a mandamus.

SIR W. W. FOLLETT applied for a rule calling upon the mayor of *Hythe* to shew cause why a mandamus should not issue, directing him to insert certain names in the burgess list for that borough.

By the affidavits it appeared that *Hythe* is one of the boroughs mentioned in sect. 2 of sched. (B.) of the Municipal Corporation Act, 5 & 6 W. 4. c. 76. The names in question had been inserted in the list prepared under sect. 15, in last *September*, and had been objected to under sect. 17. On the 14th of *October* last, the mayor and assessors proceeded to revise the list, under sect. 18, when the objection made to the names was that they were upon the registry of voters for representatives of the borough in the House of Commons, but that the parties had not paid the shilling, payable by sect. 56 of the Reform Act, stat. 2 W. 4. c. 45., to defray the expenses of the registration, "which sum shall be levied and collected from each elector in addition to and as a part of the money payable by him as his contribution to the rate for the relief of the poor, and such sum shall be applicable to the same purposes as money collected for the relief of the poor." The qualifications of the parties in other respects were proved. The mayor and one of the assessors considered

considered the objection good; the other assessor was of a contrary opinion: and the names were expunged from the list. The affidavit also contained statements for the purpose of shewing that the rejection of these names had influenced the subsequent election of councillors.

1836.

In the Matter of
The Mayor of
HYTHE.

Sir *W. W. Follett* now contended that the non-payment of the shilling could not be an objection within sect. 9 of stat. 5 & 6 *W. 4. c. 76.*, the shilling not being a part of the "rates made for the relief of the poor of the parish," nor of any borough rates directed to be paid under the provisions of that act; but he admitted that a difficulty arose as to the power of this Court to interfere. If the mayor and assessors place a party on the list who has no title, the Court will interfere by quo warranto: the present, however, is a case in which the mayor has expunged the vote; and the question is whether such expunging be not final. The case may perhaps be compared to that of an inchoate corporate right under the old system, where a mandamus lay. [*Coleridge J.* The revision was completed during the late mayoralty (*a*); and the late mayor must have handed over the list to the town clerk (*b*).] The assessors are still in office (*c*). A mandamus may go to the Court of Revision. [*Patteson J.* The mayor who revises is to write his initials against all alterations (*d*).] The case offers only a choice of difficulties.

Per Curiam (e). We have no power in this case.

Rule refused (*g*).

(a) See sect. 49 of stat. 5 & 6 *W. 4. c. 76.*

(b) Sect. 22.

(c) Sect. 37.

(d) Sect. 19.

(e) Lord Denman C. J., *Patteson, Williams, and Coleridge Js.*

(g) See stat. 7 *W. 4. & 1 V. c. 78. s. 24.*

1836.

Friday,
November 25th.

DOE on the several Demises of JAMES CROSTHWAITE and JOHN HUDLESTON against WILLIAM DIXON and JOHN WILSON.

One of two parceners aliened. The alienee and the other par-cener agreed to make partition, and, an ap-portionment having been made, they and each of them, for the perfecting of such partition, conveyed to H., in fee, one portion of the premises, habendum, to the sole use of the alienee in fee, in full of his moiety, and the other portion in like manner to the sole use of the second par-cener, in full of his moiety.

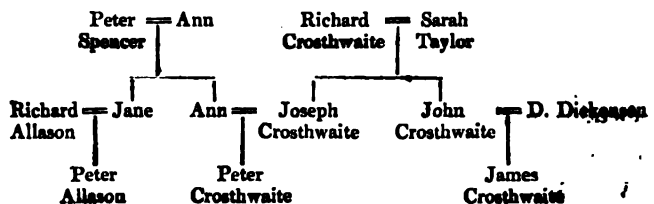
Held, that the line of descent through the second par-cener was not broken by the conveyance, but that his moiety passed to the heirs ex parte maternâ.

THIS ejectment, for closes of land situate in the parish of *Brigham* in *Cumberland*, came on to be tried before Lord *Abinger* C. B. at the Summer assizes for *Cumberland*, 1835, when a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

The lessor of the plaintiff, *James Crosthwaite*, claims the property as heir ex parte paternâ of *Peter Crosthwaite* deceased, and the defendants claim it as devisees of *Peter Allason*, who was heir at law, ex parte maternâ, of the same *Peter Crosthwaite*.

One *Peter Spencer* was formerly owner of an estate of which the property in question forms a part; and upon his death his estate descended to his two daughters, *Jane* the wife of *Richard Allason*, and *Ann* the wife of *Joseph Crosthwaite*, in coparcenary. Upon the death of *Jane*, her estate in the premises descended to the said *Peter Allason* her son and heir; and, upon the death of *Ann*, her estate in the premises descended to the said *Peter Crosthwaite* her son and heir.

The following pedigree was agreed to be correct:—



In

In 1810, one *John Nicholson* purchased *Peter Allason's* share of the property; and the same was duly conveyed by *Peter Allason* to *John Nicholson* and his heirs by indentures of lease and release, dated respectively 15th and 16th of *November* 1810, which, as well as those next mentioned, were to be referred to as part of the case.

By indentures of lease and release, dated 15th and 16th *April* 1816, between *John Nicholson* of the first part, *Peter Crosthwaite* of the second part, and *John Hudleston* of the third part, after reciting that *Nicholson* and *Crosthwaite* were seised in fee of a messuage and tenement and closes (which were described), and that they, being desirous that the said tenement, lands, and hereditaments should be divided and partition thereof made between them, had appointed certain persons to allot and divide the same, and they had done so (as was particularly specified), and that *Nicholson* and *Crosthwaite*, being satisfied with such division and partition, had agreed to join in these indentures for the ratification thereof, it was witnessed that, to perfect such partition, and to the end that each of the said parties, their heirs and assigns, might hold and enjoy for ever thereafter in severalty and distinct from each other the hereditaments and premises set out and divided as aforesaid, and for certain considerations, which were stated, the said *John Nicholson* and *Peter Crosthwaite*, and each of them, did grant, bargain and sell, alien, release and confirm to the said *John Hudleston*, his heirs and assigns, all that &c. (describing certain of the premises before mentioned), and the reversion and reversions &c., and all the estate &c., habendum to the said *J. H.*, his heirs and assigns, nevertheless to the only sole and proper use of the said *John*

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Nicholson, his heirs and assigns, absolutely for ever, as and for, and in full of, the moiety, part, and share of the said *John Nicholson* of and in the said messuage and tenement, land and hereditaments, &c., so divided and set out as aforesaid. Then followed a similar conveyance by *Crosthwaite* and *Nicholson* to *Hudleston* of the residue of the premises, to the sole use of *Crosthwaite*, his heirs and assigns, as and for and in full of his moiety.

By the deed of partition, the premises sought to be recovered in this ejectment became the property of *Peter Crosthwaite*, who from that time became and was solely seised thereof in fee, and died so seised in 1819, intestate. On his death, *Peter Allason* entered into the premises in question, claiming to be entitled as heir ex parte maternâ, and continued possessed until the time of his death. The said *Peter Allason* died in 1831, having devised to the defendants his estate and interest in the premises now sought to be recovered. *John Hudleston*, the second lessor of the plaintiff, was the releasee to uses mentioned in the deed of partition.

The question for the Court was whether *James Crosthwaite*, being heir ex parte paternâ of *Peter Crosthwaite*, was, as such, entitled to all or any part of the premises in question, or whether the defendants, as devisees of *Peter Allason*, who was heir of *Peter Crosthwaite* ex parte maternâ, were entitled. If *James Crosthwaite* was entitled, the verdict was to stand for all or such proportion of the property as the Court might direct: if not, a nonsuit to be entered. The case was argued in this term (a).

(a) November 18th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Jj.

Wightman for the plaintiff. When the premises were conveyed to *Hudleston* for the purpose of partition, the course of descent ex parte maternâ was broken, the general rule of inheritance attached, and consequently the portion allotted to *Peter Crosthwaite* descended to his heir ex parte paternâ; for, by the effect of the deed, *Crosthwaite* had become as a first purchaser. The difference between this case, where the estate vests in the taker as a first purchaser, and those in which the conveyance passes it merely to the old use, is shewn by *Co. Litt.* 13 a. (a), 2 *Roll. Abr.* 780. tit. *Uses* (D), *Abbott v. Burton* (b), *Godbold v. Freestone* (c). If the conveyance to *Hudleston* did not of itself alter the character of the whole estate, as to the line in which it was transmissible, at least the partition had that effect upon the portion which came to *Peter Crosthwaite*; for he was a first purchaser, at any rate to the extent of the share which had been *Allason's*.

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W. H. Watson, contra. Under the deed of partition, *Peter Crosthwaite* took ex parte maternâ. The line of descent was not broken. The rules on this subject are entered into, and several authorities collected, in *Martin dem. Tregonwell v. Strachan* (d), where it is said, "If a man seised as heir on the side of the mother make a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence shall ensue the nature of the lands, and shall descend to the heir

(a) See 14 *Vin. Abr.* 287, 288. *Heir* (W.), (W. 2).

(b) 2 *Salk.* 590. *S. C.* 1 *Com. Rep.* 160.

(c) 3 *Lep.* 406.

(d) 5 *T. R.* 107. note (b). *S. C.* 2 *Str.* 1179, and in *Erros, Wiles*, 444. 1 *Wils.* 66. 6 *Brown's P. C.* 319. (2d edit.).

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on the part of the mother." Unless the conveyance be of such a kind that a different estate is taken under it, the line of descent continues. Then, in the present case, did *Peter Crosthwaite* take a different estate in entirety or in moiety? The effect of a partition is merely to regulate the enjoyment; it does not alter the character of the estate: the tenant is in of the same estate as before. "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct." "But a coparcener, after partition, continues in the same privity of estate as before; for it does not convey, or make any alteration of the estate." "So, parceners shall be in from the common ancestor, as before." *Com. Dig. Parcener* (C 15), citing *Savile*, 113 (a). Partition by writ would clearly not have broken the line of descent; and partition by deed is only another mode of enforcing what the law would have compelled by writ. That partition does not alter the estate is proved by the cases in which it has been held not to operate in revocation of a will: *Luther v. Kidby* (b), *Risley v. Baltinglass* (c), *Swift dem. Neale v. Roberts* (d), in all which cases the partition was by deed. *Luther v. Kidby* (b) is recognised as law by Lord Kenyon in *Goodtitle dem. Holford v. Otway* (in Error) (e), and is explained, in the same case in the Court of Common Pleas (g), by Buller J., who says, "In the case of a partition, where no estate moves out of the party, I agree there is no revocation." [*Wightman* here admitted

(a) *Thetford v. Thetford*.

(b) 8 Vin. Abr. 148. *Devise*, (R. 6.) pl. 30. S. C. 3 P. Wms. 169. Note (B.).

(c) *Sir T. Ray*, 240.

(d) 3 Burr. 1490.

(e) 7 T. R. 399, 417.

(g) 1 B. & P. 590—592. See further, as to the cases on this point, note (4) to *Duppa v. Mayo*, 1 Wms. Saund. 278 b.

that,

that, if the conveyance to *Hudleston* was merely to the use of the parties between whom partition was to be made, he could not contend that, by such a conveyance, the character of the estate was altered, as to the course of descent.] Then as to the moiety taken by *Peter Crosthwaite* on the partition; the portion allotted to him is not of a new estate: it is only a continued enjoyment, so far as the apportionment goes, of the old estate. *Nicholson* and he were tenants in common, the one holding by purchase, the other by descent. On the partition, *Crosthwaite* does not take anything by purchase; he is still in, by descent, of the property which he always had by descent.

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Wightman in reply. *Nicholson* and *Crosthwaite* had an undivided possession of all the premises, occupying per my et per tout; *Nicholson* as purchaser, and *Crosthwaite* as heir. By the partition, *Crosthwaite* took an estate in one moiety, partly made up of his own interest in the moiety, and partly of that which *Nicholson* had in it by purchase from *Allason*. Then, at least as to half of the half, *Crosthwaite* became entitled as purchaser, and his estate would descend to the heir ex parte paternâ.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.

In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener,

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the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is whether by that deed the parcener took any thing as purchaser, so as to break the descent ex parte maternâ, and to let in the heir ex parte paternâ on the death of the parcener.

It is admitted that, if the deed of partition had been between the parcnens themselves, the descent would not be broken; *Com. Dig. Parcnens* (C 15.). But it is said that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if anything was taken from him: but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty discharged from any right in the alienee, instead of an undivided moiety in common; but he had the same estate in the land as before.

The consequence is that a nonsuit must be entered.

Nonsuit to be entered.

1836.

The KING *against* The Inhabitants of
MILVERTON.

Friday,
November 25th.

THIS was an indictment against the inhabitants of the parish of *Milverton, Somersetshire*, for non-repair of certain highways in that parish. The defendants pleaded Not Guilty. On the trial at the Summer assizes for *Somersetshire* 1835, a special verdict was agreed to, the material parts of which were as follows.

The parts of the highway mentioned in the several counts of the indictment were in the parish of *Milverton*, and were out of repair. The several parts of the said highway were called *Blackgrove's Lane*, which lane was part of a common highway from the village of *Oak* to the town of *Milverton*. All the ways mentioned in the indictment were comprised in the after-mentioned order. One portion of the highway, mentioned in the first and third counts of the indictment, was wholly in *Milverton*; another portion, mentioned in the second and third counts, was, as to half of its breadth, in the parish of *Milverton*, and, as to the other half of its breadth, in the parish of *Oak*, in *Somersetshire*. On *February 25th*, 1818, an order was duly made under the hands and seals of two justices of the county of *Somerset*, who therein stated that, at a special sessions holden at &c., in the parish of *Milverton*, "hav-

An order of justices for stopping an unnecessary highway, under stat. 55 G. 3. c. 68. s. 2., is bad, if it stop up half the breadth of a highway, leaving the rest open; although the other half be not within their division.

Quære, whether the justices of the two divisions could, by orders made concurrently, stop both sides.

Justices cannot stop several highways by one order, except so far as they are authorised by stat. 5 & 6 W. 4. c. 50. s. 86.

Semble (by Lord Denman C. J. and Coleridge J.) that, if an order has been properly made and enrolled for stopping a highway, it is

not necessary, to make such order completely effectual, that an actual stoppage should have taken place.

Held, by Lord Denman C. J. and Williams J., that, if an order for stopping a highway, under stat. 55 G. 3. c. 68., begins "We," &c. "having upon view found, and it appearing to us," that a certain highway, &c., is unnecessary, the recital does not imply that the justices acted upon any other information than their own view, and is well enough.

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against
The Inhabit-
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ing upon view found, and it appearing to them, that a certain public highway in the parish of *Milverton*, called, &c., (describing it) is useless and unnecessary; and also that a certain other public highway, commonly called *Blackgrove's Lane*, lying between &c., is useless and unnecessary, the entirety of which last-mentioned highway from *H. common* &c. to the northern corner of close *C. &c.*, of the length &c., and breadth &c., is situated and being in the parish of *Milverton* aforesaid, and the southern side of the said highway to the middle thereof, from the said northern corner of close *C. &c.*, to the north-eastern corner of the same close, of the length &c., and breadth &c., is situated and being in the parish of *Milverton* aforesaid, and the northern side thereof to the middle of the same highway, from the said northern corner &c. to the said north-eastern corner &c., is situated and being in the parish of *Oak* in the same county; and also that a certain other public highway, &c., is useless and unnecessary (describing another road, which, as to one part of it, was in *Milverton*, and, as to another, was divided like the preceding, between *Milverton* and another parish); they did thereby order "the said public highway hereinbefore first described and stated to be useless and unnecessary, and also the said public highway hereinbefore secondly described and stated to be useless and unnecessary, except so much and such part thereof as is in the said parish of *Oak*, in the county aforesaid, and likewise the said public highway hereinbefore thirdly described and stated to be useless and unnecessary" (with a like exception), "to be stopped up," and the land sold by the surveyors of *Milverton* to the proprietors of the adjoining lands, if willing to purchase for the full value; if not, to some other

other person &c. for the full value; reserving to the owners and occupiers of adjoining lands and hereditaments free passage for persons, horses, carriages, &c., over the land and soil of the highways ordered to be stopped, to and from the same lands and hereditaments, according to their ancient usage thereof respectively.

The verdict went on to state that the three highways directed to be stopped up were not joined to or connected with each other, and did not lead into each other, but were altogether distinct, and at considerable distances from each other; that *Blackgrove's Lane* comprehends as well the parts of the said highway in the said parish of *Oak*, as those in *Milverton*; that such portion of the said highway as is stated in the order to be in the parish of *Milverton* is the same highway as is mentioned in the indictment; and that no order of justices has been made for stopping such parts of *Blackgrove's Lane* as are stated to be in the parish of *Oak*; that the said highway has never been divided and allotted under the provisions of 34 G. 3. c. 64 (a); that the special sessions at which orders are made for stopping up roads in *Oak* are held at *Tuunton*, and not at *Milverton*, and the parish of *Oak* is not within the division for which those justices acted, who signed the present order; that the parts of the said highway which were ordered to be stopped up have not been stopped up in fact, and that the three several highways have been and are in the same state as before the order, and the public has passed and repassed over them with carriages and horses without interruption in the same manner as before, but without any permission by the respective owners of the adjoining lands; that, since the date of the order,

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no repairs have been done by the inhabitants of *Mil-
verton* parish upon the highways so ordered to be
stopped up; that the land and soil of the said high-
ways have not been sold according to the directions, and
subject to the reservations, contained in the said order,
such land and soil being of no value to any person, as
they could not be inclosed in consequence of the said
reservations; that notices of the said order having been
made were duly affixed and published &c.; and that the
same was duly confirmed and enrolled, and not appealed
against. The verdict was argued this term (a).

Rogers, for the Crown. The facts stated do not entitle
the defendants to an acquittal. First, the order for
stopping, which they rely upon, includes three distinct
highways. But stat. 55 G. 3. c. 68. s. 2., under which
the order was made (and which first enabled justices to
stop a highway as unnecessary, without any other being
created in lieu), gave no authority to include three high-
ways in a single order, and the power taken under that
statute must be strictly pursued. The justices are
thereby enabled to stop, "by such ways and means, and
subject to such exceptions and conditions," as were men-
tioned in stat. 13 G. 3. c. 78., in regard to highways
to be widened and diverted. That statute does not
sanction the including more than one road in an order.
It was decided, this term, in *Rex v. The Justices of Mid-
dlesex* (b), on the construction of both statutes, that a
highway could not be diverted, and the old way stopped,
by one order: and in *Rex v. The Justices of Kent* (c) a
similar decision was come to, Lord *Tenterden* saying,
"The statute gives no power to make such an order,

(a) *November* 19th and 21st.(b) *Ante*, p. 626.

(c) 10 B. & C. 477.

and there is no form in the schedule applicable to such a mode of proceeding." Stat. 19 G. 3. c. 78. *sched.* No. 18. gives the form of an order for stopping up an old highway, with a marginal direction, that "if there are more highways than one to be stopped up, there should be a separate order for each." In general, the marginal note annexed to a statute is not attended to by the Court; but this annotation is stated, in the report of *Rex v. Kenyon* (a), to be upon the margin of the Parliament roll itself, and the legislature cannot be supposed to have overlooked that fact, when referring, by stat. 55 G. 3. c. 68. s. 2., to the "ways and means," "exceptions and conditions," pointed out in the prior statute. It is also stated in 3 *Chitty's Burn's Justice*, 45., *Highways*, IX. (3.) (b), and *Wellbeloved on Highways*, 401, note a. (c), that, where more than one highway is to be stopped, it seems there should be separate orders. And in the late act, 5 & 6 W. 4. c. 50. s. 86., which is not a declaratory clause, it is enacted "that in any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate." This warrants the inference that, before, it was not lawful so to join them, even in the case pointed out. *Davison v. Gill* (d) shews that the forms given by the old highway acts were to be strictly followed; but this is not a mere objection of form. If notice is given of a cumulative order for stopping several highways, the

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(a) 6 B. & C. 645. note (a).

(b) Ed. 26.; and see ed. 28, vol. iii. p. 118. *Highways*, s. XIII. 2.

(c) Both refer to *Rex v. Kenyon*, 6 B. & C. 645.

(d) 1 East, 64.

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public is not so distinctly apprised of the intention with respect to any one as if that alone were mentioned; and great difficulty might arise as to the notices of appeal to be given against such an order.

A second objection to this order is that, as to one part of the roads indicted, two magistrates of the *Milverton* division have found the whole of the way useless, but have stopped only a part of its breadth. If any proceeding could be taken for such a purpose, it should have been by stopping each side. The two sides of the road lie in divisions for which different justices act; but two justices of each division might have viewed: and there is no authority for saying that two justices of one division might not have stopped the part of the road lying in the other. "Where an act of parliament says, justices of the peace of such a division shall do so and so, it is only directory quoad the division; and any of the justices of the county may do it. *Per Holt C.J.*" 19 *Vin. Abr.* tit. *Statutes*, 516. (E. 6.), pl. 56. (a). [*Coleridge J.* The justices must hold their special sessions for the highways within the limits for which they respectively act. You must contend that, to make an order for stopping the whole breadth of the way, there must be different special sessions, the justices in each making an order as to part of the way. If any of them made an order for more, they would be acting out of the limits for which the session was held.] If each set of justices made an order for the whole, the orders might perhaps be taken distributively, each for so much as the authority of the particular justices extended to. [*Coleridge J.* Is there any authority for saying that an order of justices

(a) Citing *Anon.* 12 *Mod.* 546.

can be made for stopping half the breadth of a road?] There appears to be none. If the power of these justices was to stop half the way only, they ought not to have viewed the whole and declared it unnecessary: if they could view and declare as to the whole breadth, they should have stopped the whole. The power to stop any "highway, bridleway or footway," does not warrant the partial stopping attempted here. It would be very inconvenient to the public to have half the breadth of a road shut up: if any stopping takes place, they ought to be disburdened of the whole.

Further, nothing has ever been done in execution of the order. By stat. 55 G. 3. c. 68. s. 4., if there be no appeal, "the said inclosures may be made, and the said ways stopped; and the proceedings *thereupon* shall be binding and conclusive." This shews that something more is necessary than the mere making and enrolment of an order. [Coleridge J. Do you contend that there must be a physical stopping of the road?] Something must be done in execution of the order. [Coleridge J. Suppose the soil is sold to an individual who chooses to keep it open, would the public right over it still continue? It is usual to put up a notice that the passage over the land is closed, but the proprietor might omit doing so.] Parties must do more than obtain an order and keep it to themselves: the public in general must be apprized by some act that the way is stopped; otherwise there is no meaning in the words "proceedings *thereupon*." And here (which is another ground for contending that the order is ineffectual) the public has in fact been permitted to pass uninterruptedly over the soil in question for seventeen years, or has done so in exercise of an adverse right.

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[Lord Denman C. J. Could the user by the public be placed in any more favourable light for you than as strong evidence of a dedication? Coleridge J. And here no person was in a situation to dedicate. The soil did not immediately revert to the owner of the adjoining land, because, in order to entitle him, the statute requires that it should be sold to him.] The statutory power being imperfectly executed, the soil would vest, at common law, in the owner of the adjoining land.

Lastly, the order begins, "we," "having upon view found, *and it appearing to us.*" It is not therefore shewn that the order proceeded simply "upon the view" of the two justices, according to stat. 55 G. 3. c. 68. s. 2. In *Rex v. The Justices of Worcestershire* (a) the words were "having upon view found, *or it having appeared to us;*" which was held objectionable, as representing that the justices had done that which the legislature required, or something else. Here they are shewn to have acted on view, *and something else*, which may not have been actual inspection. An order in very similar words was held bad in *Rex v. The Marquis of Downshire* (b). [Lord Denman C. J. The "appearing," as stated here, is a result of the view. In *Rex v. The Marquis of Downshire* (b) the justices did not state that they found any thing on view. Williams J. If the order had said only "it appearing to us," your objection would have been well founded. Why are we to suppose here that it did not appear on the view?] The Court will intend nothing to give jurisdiction: whatever is necessary to give it must be shewn. [Lord Denman C. J. Here it is shewn; only something else is added.]

(a) 8 B. & C. 254.

(b) 4 A. & E. 698.

Bere, contra. There is no authority which decides that an order of justices, in general, may not include two distinct subject-matters; *Rex v. Maulden (a)* shews that two such matters may be included, and that the order may be good as to one, and bad as to the other. An order must sometimes adjudicate on distinct matters. Where a mother and an infant bastard child are removed by the same order, the settlement of each must be pronounced upon. There is no greater objection to including several roads in one order than in one indictment. Even if several distinct felonies are included in the same indictment, it is not therefore bad. The old highway act, 13 G. 3. c. 78. s. 22., gave a power so far resembling that of stopping unnecessary highways under stat. 55 G. 3. c. 68. s. 2., that, in stopping the old way, the proceeding had no dependence upon any previous step for diverting or newly creating another way: but there is not, in the schedule to stat. 13 G. 3. c. 78., any form applicable to such independent proceeding. The stopping where no diversion was in fact made, as under stat. 55 G. 3. c. 68., was not contemplated in the former statute, and therefore it might be expected that no part of the schedule would be framed to meet that particular case. The marginal note to the schedule in the parliament roll appears to have crept in contrary to usual practice; the body of the statute, in the roll, has none. The note is not imperative, but says merely that there "should be a separate order" for each highway. Even if this were otherwise, a form given in a schedule, without any express direction in the statute itself, is (as *Parke B.* said in *Hennah v. Whyman (b)*) "nothing but

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(a) 8 B. & C. 78. See *Rex v. St. Nicholas, Leicester*, 3 A. & E. 79.

(b) 2 Cro. M. & R. 239. S. C. 5 Tyrwh. 792.

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an example." In *De Ponthieu v. Pennyfeather* (a) the enactment of stat. 13 G. 3. c. 78. s. 19., as to enrolling the certificate of justices there mentioned, was held to be directory only. *Bayley J.*, in *Rex v. Casson* (b), doubted whether it was necessary, in an order for diverting under the same statute, to name the owners of the land through which the road was to pass, though the schedule, No. xvi., leaves a blank for such names. In *Davison v. Gill* (c) the order was substantially defective, in not stating the length or breadth of the new way given to the public. Supposing this order to be incorrect, it is not absolutely void, but voidable only, by some direct judicial proceeding. *Rex v. Stotfold* (d) and *Gray v. Cookson* (e) shew the principles applicable to this point. It is attempted here to impeach, collaterally, an order which has remained unquestioned for seventeen years. Including several roads in the same order may, in some respects, be more convenient than separating them. It is, at all events, less expensive. Supposing that there had been, in the old highway act, a form applicable to the mere stopping of an unnecessary highway, it is not clear that the words "by such ways and means, and subject to such exceptions and conditions," in stat. 55 G. 3. c. 68. s. 2., ought to be construed as referring to such form, or to any thing but the sale mentioned immediately before. Sect. 86. of stat. 5 & 6 W. 4. c. 50., as to stopping more than one highway by the same order, may have been inserted to remove doubts, but it is not an enabling clause; and the next section speaks of an appeal

(a) 5 *Tunst.* 634.(c) 1 *East*, 64.(e) 16 *East*, 13.(b) 3 *Dowl. & R.* 36.(d) 4 *T. R.* 596.

"against the whole or any part or parts of any order," (not any *such* order), "or certificate for diverting more highways than one." If it had been considered that all orders including several roads, except in the case pointed out by sect. 86., were, and were to continue ineffectual, that would have been expressed.

As to the second objection. It is true that the justices in their recital have found the whole highway, lying partly in *Milverton* and partly in *Oak*, to be unnecessary; but they have stopped only the part in *Milverton*, over which they clearly had jurisdiction. Although the recital may be too large, it shews that the part actually stopped was unnecessary: the finding that the whole was so may be taken as the mode by which they arrive at their conclusion as to the part; and, at all events, *utile per inutile non vitiatur*. And, if the effect of stopping up part were to make the whole useless, it would be proper to shew that the whole was unnecessary. If part had been necessary, that would have been a ground of objection, on appeal, against stopping the rest. Whether or not the justices could have stopped the part in *Oak*, though they would have had no right to be summoned on a special session for the limit within which *Oak* lies, may be a difficult question. On looking to the form of stat. 18 G. 3. c. 78. sched. No. xvi., and the words "acting within the (hundred, &c.) of —," and "in the said (hundred)," which occur there, it would seem that they could not go beyond their own district. It is said that a second order should have been obtained for stopping the part in *Oak*, from the justices of that division: but the present order, if bad at the moment of making it, could not have been made good by that proceeding.

[Coleridge J. Is there any authority for stopping less

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than the entire highway?] The justices may stop any way, to the extent of their jurisdiction; and here they have done no more. Suppose that, instead of the breadth, the length of a highway were divided between the district for which the justices act, and another; and the stopping of one would stop both; in point of law they would be entitled to stop the part within their jurisdiction; if the part out of their jurisdiction, and which was thus rendered impassable, was necessary to the public, that would be an objection in point of fact to the order; for the finding on which it proceeded, that the part stopped was unnecessary, would not be true. [Coleridge J. Could the justices virtually stop a highway, without giving notices at the places where that effect would be produced?] The notices expressly required by stat. 55 G. 3. c. 68., and no others, would be necessary. [The Court then intimated that it was unnecessary to hear the other points argued for the defendants.]

Lord DENMAN C. J. This case is very clear, upon the second objection to the order. Power is given to the justices to stop any highway which they find to be unnecessary. Stopping part of a way is not an exercise of that power. In the instance last put, where a road runs through different districts, but a part of it is wholly within one, though it might be very proper that the magistrates of the districts should communicate with each other, and concur in the order, their not having done so would be no decisive objection. But where, as in this case, an entire highway could not be stopped unless two sets of justices concurred, and there is no such concurrence, the statute is not carried into effect.

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PATTESON J. The second section of stat. 55 G. 3. c. 68. is sufficient to decide this point. The justices have not stopped up an unnecessary highway, bridle-way, or footway, as they are there empowered to do, but they have narrowed it. No such power is given to them. If the difficulty could have been removed by four justices meeting and making orders for stopping the two portions of the road, well and good; but that course has not been adopted. If that could not be done, no order could be made.

WILLIAMS J. If that course was available, it would have been well that the justices had adopted it; if it was not, the case is not provided for by the act.

COLERIDGE J. Before the act, 55 G. 3. c. 68., this power of stopping unnecessary highways could not have been exercised. We must therefore look to the act, to see what the justices can do. The difference between the power assumed here, and that given by the act, is material. The inhabitants of a district might be willing that the whole of a road should be stopped, but not half its breadth. Parties charged with repairs might be satisfied to bear the burden for a whole road, but not for the half. Here, the inhabitants would no longer have an entire road, but would still remain liable to repairs. I should think that this was a *casus omissus* in the statute. As to the course which has been suggested, it might not be possible to get four justices to meet for the purpose: but it is not necessary to go into that discussion.

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Bere afterwards suggested that there was a highway mentioned in the order, and in the indictment, to which the objection now decided upon did not apply. The Court therefore took time to consider on the first point.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

One, among the numerous points, on which we gave judgment for the crown, being applicable to one only of the roads indicted, we have had to consider the other of them which was argued before us on both sides.

The prosecutor contended that the order for stopping up the road in question was invalid, because it stopped up also two other roads perfectly distinct from it: and we are of opinion that this objection must prevail.

The power of stopping roads is vested in the justices of the peace, by 55 G. 3. c. 68. s. 2., a power unknown to the common law, and requiring to be exercised in strict conformity to the statute which creates it.

The clause enacts, that it shall and may be lawful to stop roads by such ways and means in all respects, as are prescribed by the 13 G. 3. c. 78., for widening or diverting highways. These are to be found in the sixteenth section, and in numbers xvi, xvii, and xviii, of the schedule annexed to the latter act; and the form of the order for stopping up, which is No. xviii, clearly contemplates one highway only.

There is a marginal note to this form, which is not merely found in the printed act, but in the parliament roll. "If there are more highways than one to be stopped up, there should be a separate order for each." These words are a part of the act of parliament, and

must

must receive their full effect. Even if they were of less weight, the language of 55 G. 3. c. 68., constantly referring to one order, one notice, one highway, would appear to the Court sufficient to limit the operation of any order to a single road. This is required both for convenience and fair dealing: it is also the proper construction of a statute which creates a new power, and expressly defines the manner in which it must be exercised.

Such was the view taken by Lord *Kenyon* in *Davison v. Gill* (a), and by Lord *Tenterden* in *Rex v. The Justices of Kent* (b), to which, on a late occasion, we felt ourselves bound to adhere (c).

A simple rule is thus laid down for the guidance of magistrates, and the protection of the King's subjects: the former will not be perplexed with small distinctions, nor the latter deprived of their rights without full and clear notice.

Judgment for the crown.

(a) 1 *East*, 64.

(b) 10 B. & C. 477.

(c) *Rex v. The Justices of Middlesex*, *antè*, p. 626.

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At a letting of lands, the terms of letting were read from a printed paper, and a party present agreed to take certain premises from *Lady-day* then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let and to take, subject to the printed terms, the name of the farm and the rent, and that the letting was for one year certain from *Lady-day*, and so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at *Lady-day*, and paid rent.

Held (assuming the first transaction not to have been a demise), that there was a valid demise by parol under stat. 29 Car. 2. c. 3. s. 2. when the tenant entered; that a demise rendered valid by that section might contain the same special stipulations as a regular lease; and that, on the trial of an action by the landlord against the tenant for breach of them, the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations.

ASSUMPSIT, on a farming agreement, and for rent. Plea, among others, non assumpsit. The defendants were executors of the lessee. The alleged breaches were of special conditions as to husbandry. On the trial before *Parke B.* at the *York Spring assizes*, 1835, the following evidence was given to shew a letting on the terms insisted upon. The plaintiff's steward said that, when any one applied to take one of the farms, he put into the party's hands a set of printed rules; and, if he were satisfied with the conditions, and with the farm and rent, the steward made a verbal agreement with him; a memorandum was afterwards added at the foot of the printed rules, containing the rent, quantity of land, and any special particulars; and, this having been read over in the presence of the new tenant and a witness, the steward considered the terms concluded upon. The plaintiff's solicitor stated that, in the present instance, the papers of rules and memorandums were produced to the tenants at a meeting, *December* 1819, and the memorandums read to each tenant respectively, for the purpose of receiving their acknowledgment of holding on the terms stated. The testator's father was then tenant of the premises in question, for a

term

term ending on *Lady-day* 1820. *John Tomlin*, the testator, having agreed with the steward to take the same premises, and having had the printed terms read over to him, attended the above meeting, where the rules were produced, and the memorandum of his taking read to him by the plaintiff's solicitor, and he was asked if he agreed to take the farm on those terms; to which he assented. The memorandum stated that *W. S.* (the steward), as agent of Lord *Bolton*, agreed to let, and *J. T.* (the testator) agreed to take, &c., stating the farm, the rent and times of payment, and that the term was for one year certain, and so from year to year, until due notice to quit, from *Lady-day* next, subject to the printed terms. The memorandum purported to be "in the presence of me, *L. T.*" (the plaintiff's solicitor), and was signed by him, but not by either of the parties or his agent for that purpose. The testator entered at *Lady-day* 1820, and held and paid rent till 1821, when he died, and his executors, the now defendants, succeeded him. They paid the rent down to 1833; and on some occasions they asked to have deviations allowed (it was not stated in what particulars) from the terms of the holding. The paper containing the memorandum was produced at the trial, stamped with a lease stamp; but its reception as evidence was objected to, the defendants' counsel insisting that, for want of proper signature, it was not admissible as a lease, under sect. 1. of the Statute of Frauds; nor, for the same reason, was it admissible as an agreement under sect. 4., since the terms were not to be performed within one year from the making of such agreement. The learned Judge allowed the document to be read, being of opinion that it was only a qualification of a

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demise, which demise was itself valid without writing under sect. 2. of the Statute of Frauds (a). He gave leave, however, to move to enter a nonsuit; and the plaintiff had a verdict. In the next term, a rule nisi was obtained for entering a nonsuit.

Alexander and Joseph Addison shewed cause in this term (b). First, the evidence shewed a demise for a term not exceeding "three years from the making" of such demise, within stat. 29. Car. 2. c. 3. s. 2., and consequently not within the operation of sect. 1., which enacts that leases not in writing and signed by the parties making the same, or their agents, shall have the effect of leases at will only. It is contended that, as the term here was not to commence immediately, there was no actual demise within the protection of sect. 2, and that the document produced at the trial must be considered as an agreement within sect. 4, and therefore void, because not signed by the party to be charged. But *Ryley v. Hickes* (c) shews that the exception in sect. 2 is not confined to leases which commence from the time of making, but extends to others, provided the term granted by them does not exceed three years from the making. And *Dampier J.* in *Inman v. Stamp* (d) admitted that the practice had been with the foregoing

(a) As to the use made of the document, see the judgment of the Court, p. 864. post.

(b) November 21st. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(c) *Bull. N. P.* 177. *S. C.* 1 *Str.* 651.

(d) 2 *Selw. N. P.* 844. 9th ed. *S. C.* 1 *Stark. N. P. C.* 12. See *Edge v. Stafford*, 1 *Cr. & Jer.* 391. *S. C.* 1 *Tyr.* 295., cited 2 *Selw. N. P.* (as above). In the present argument the 8th edition was referred to.

case, though he himself inclined to the opinion that sect. 2 was confined to leases executed by possession. In a lease to commence at a future period, an interesse termini passes, and the lessee is tenant, for some purposes, from the time of the execution; note (1) to *Took v. Glascock* (a). It may be urged that the grant here was of a reversion merely, and therefore ought to have been by deed; but in 4 *Bac. Abr.* 847. *Leases* (N)(b), it is said that, "if one makes a lease to A. for ten years, and the same day makes a parol lease to B. for ten years of the same lands, this second lease is absolutely void;" but that, "if such second lease had been made for twenty years, then it had been good as a future interesse termini for the last ten years." [Coleridge J. The parol lease there is supposed to commence immediately.] *Bracegirdle v. Heald* (c), which may be cited, was the case of a contract for a year's service, to commence at the end of a month. The present contract is not an agreement for something to be done in future, but the conveyance of an immediate interest. Nor has the instrument any of the characters of an agreement. The memorandum indorsed upon the paper of terms is not an agreement for something to be done in future, nor part of such agreement; it is rather to be considered as a note of the bargain, taken by a third person, as in *Rex v. St. Martin's Leicester* (d), and *Rex v. Wrangle* (e), by way of precaution, but not forming part of the transaction, nor necessary to render it valid. Although no part of the written instrument may have operated of itself as a demise, still, an entry and occupation in fact being

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(a) 1 *Wms. Saund.* 251.

(b) 7th ed.

(c) 1 *B. & Ald.* 722.(d) 2 *A. & E.* 210. 4 *N. & M.* 202.(e) 2 *A. & E.* 514. 4 *N. & M.* 375.

proved,

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proved, this document might be made use of, under the circumstances, to shew upon what terms the parties held. The tenants had recognized the terms, and had even, in one instance, asked permission to deviate from them. It was for the defendants to shew that they held, not upon those terms, but on other and independent ones. Where a demise in writing has been considered void, as to the length of the term, by sect. 1 of the Statute of Frauds, the Court has nevertheless held that distinct stipulations in the same instrument might be looked to as shewing the conditions of the tenancy in other respects; *Doe dem. Rigge v. Bell (a)*, *Richardson v. Gifford (b)*.

Cresswell and Wightman, contra. The instrument in question was an agreement "not to be performed within the space of one year from the making," within stat. 29 Car. 2. c. 3. s. 4., and therefore void for want of signature. If *Rex v. St. Martin's, Leicester (c)* and *Rex v. Wrangle (d)* apply here, the rule must be absolute, because it is clear that the writings under discussion there could not have been used in evidence, but the instrument in the present case was so used. This, however, was, in fact, not a mere note to refresh the memory, but, as its language imports, an agreement for a future letting. By a lease to commence in future, an interesse termini is granted, but not a present estate in the land: if it were, such estate would merge, if the grantee, while entitled to it, took an estate for life in the same premises; but the contrary was decided in *Doe dem. Rawlings v. Walker (e)*. A lease for not more than three

(a) 5 T. R. 471.

(b) 1 A. & E. 52.

(c) 2 A. & E. 210. 4 N. & M. 202.

(d) 2 A. & E. 514. 4 N. & M. 375.

(e) 5 B. & C. 111.

years

years from the making may be granted without writing, though to commence in future, and, when so granted, will be sufficient, if it be not sought to enforce by it any terms beyond those ordinary ones which are understood to result from the relation of landlord and tenant, and the custom of the country. But, if special terms are to be added, that must be by express agreement; and, if the agreement is one which, according to the contemplation of the parties when making it, will not be performed, that is completely performed (*Boydell v. Drummond (a)*), within a year, there must be a writing, properly signed, within sect. 4 of the Statute of Frauds. Now a demise, as in this case, to hold for one year certain, and so from year to year until notice to quit, is, according to all the authorities (from *Say v. Smith (b)* downwards), a demise for two years certain; and the terms of the present holding are, in many instances, special, and such as could be established only by express agreement. *Bracegirdle v. Heald (c)*, therefore, is an applicable authority; and *Ryley v. Hickes (d)*, supposing it to be law, which was questioned in *Inman v. Stamp (e)*, does not apply, being a case on sect. 2 of the statute, whereas the present case falls under sect. 4. *Ryley v. Hickes (d)* only shews that a demise for less than three years may be made by parol upon such ordinary terms as are understood without special agreement. To hold that a demise containing special terms came within sect. 2, would let in all the frauds which the statute was intended to prevent. The conditions here are not a qualification of the demise, but the very terms of

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(a) 11 *East*, 142.(b) *Plowd.* 273.(c) 1 *B. & Ald.* 722.(d) *Bull. N. P.* 177. *S. C.* 1 *Str.* 651.(e) 2 *Sels.* *N. P.* 844. 9th ed.

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it; and they are properly the subject of a special agreement within sect. 4. [*Patteson J.* Your argument tends to shew that, on a tenancy from year to year created without writing, there could not be a specific rent reserved, but that the demand must always be on a quantum meruit.] If the tenant went in and paid rent for a time, the rent so paid would shew what ought to be paid subsequently. A difficulty like that now suggested might have been raised in *Bracegirdle v. Heald (a)*. If the present transaction were held to be a demise protected by sect. 2. of stat. 29 *Car. 2. c. 3.*, special terms might always be annexed to the letting by means of some parol agreement, supposed to have taken place before the tenancy began.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—

This was a special action of assumpsit for breach of the terms of a parol lease. The defendants were executors of the lessee. The facts were that, in the month of *December* 1819, the testator's father was tenant of the premises till the following *Lady-day*. The plaintiff's attorney, in the month of *December* 1819, proposed to let the plaintiff's farms, at a meeting, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at *Lady-day*; but no writing was signed. He did then enter, and continued tenant till his death; since which the defendants, his executors, have occupied and paid rent. At the foot of the printed paper of terms

(a) 1 B. & Ald. 772.

was written a memorandum, not signed by either party, but by a clerk of the plaintiff's agent. This memorandum commenced in the following terms: "*A. B.*, as agent of the plaintiff, agreed to let, and *C. D.* agreed to take," &c., going on to state the farm, rent, and when payable, — for one year certain, and so from year to year until a due notice to quit, from *Lady-day* next. The plaintiff had a verdict, with liberty to the defendant to move for a nonsuit.

It is contended, on behalf of the plaintiff, that the testator became tenant at all events on his entry at *Lady-day* 1820, if not before, and that the memorandum might properly be adverted to for the purpose of shewing the terms of the tenancy, although not to show any agreement to become tenant. On the other hand, it is contended that this was an agreement not to be performed within a year, and so required to be in writing by the fourth section of the Statute of Frauds; and that, although a tenancy from year to year may have been created, yet that the terms of it could be only such as result by law from the mere relation of landlord and tenant, there being no writing to satisfy the statute.

Now, assuming that what passed in the month of *December* did not amount to a demise (see *Inman v. Stamp* (a), *Edge v. Stafford* (b)), and that, whilst it remained an executory agreement, the performance of it could not be enforced, yet it by no means follows that, when an actual demise by parol took place, and which was valid under the second section of the statute, and a tenancy was actually created by entry and payment of rent, the terms of that tenancy may not be proved by

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(a) 2 *Schw. N. P.* 844. (9th ed.) *S. C.* 1 *Stark. N. P. C.* 12.

(b) 1 *C. & J.* 391. *S. C.* 1 *Tyrwh.* 295.

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parol. Leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth; and it seems absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements. No authority is or can be cited, to shew that it may not; on the contrary, it has always been assumed that a parol lease, warranted by the second section, may be as special in its terms as a written one, and we are of opinion that the law is so.

But it is contended that, in this view of the case, the memorandum could only be used to refresh the memory of a witness; and perhaps in strictness that may be so. We cannot, however, find that it was used substantially in any other manner; certainly it was not treated as being in itself a binding instrument: and whether in fact it was read by the officer of the Court, or by the witness, is immaterial, no objection on that ground having been taken at the trial. On these grounds we are of opinion that the verdict is right, and that this rule to enter a nonsuit must be discharged.

Rule discharged.

END OF MICHAELMAS TERM.

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MICHAELMAS VACATION.

IN THE EXCHEQUER CHAMBER.

(Error from the King's Bench.)

A. M. CAMPBELL, Clerk, J. KELLY, and J. *Saturday,*
November 26th.
 COCHRANE, against MAUND.

ERROR from the Court of King's Bench, on a bill of exceptions.

The defendant in error declared in trespass against the plaintiffs in error, for that they, on 4th *August* 1835, with force &c., assaulted him, he then being one of the churchwardens of the parish of *Paddington*, in the county of *Middlesex*, expelled him from the vestry room of the parish, and hindered and prevented him from being present at a certain general meeting of the vestry of

The right to demand a poll is by law incident to the election of a parish officer by a shew of hands.

At the election of a churchwarden of the parish of *Paddington*, in *Middlesex* (subsequently to stat. 58 G. 3. c. 69.), the

shew of hands was in favour of *M*. A poll was demanded by a rate-payer present, who required that it should be taken according to stat. 58 G. 3. c. 69. s. 3. (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which *H*. and *G*. had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, and did not vote. By stat. 58 G. 3. c. 69. s. 8. nothing in that act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By stat. 5 G. 4. c. cxxvi. the vestrymen of the parish of *P*. are to be elected by ballot, by plurality of votes, as under stat. 58 G. 3. c. 69. s. 3.; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; and overseers are to be nominated by the vestry as may be done by parishioners in vestry in other cases. Before either act passed, and ever since, churchwardens were elected in *P*. by shew of hands, no poll ever having been demanded.

1. Held, that (assuming stat. 58 G. 3. c. 69. s. 3. to be inapplicable to the parish of *P*.) *G*. and *H*. were duly elected, the irregularity in the form of demanding the poll (if any) having been waived by the poll being in fact taken without objection from either party to *there being a poll*; and *H*. and *G*. having a majority on the poll according to either way of reckoning the votes.

2. Also, that stat. 58 G. 3. c. 69. s. 3. was applicable to *P*.; for that the fact of no poll ever having been demanded did not shew that the usage *de facto* in *P*. excluded a poll, and the elections were, at the time of passing stat. 5 G. 4. c. cxxvi., subject to stat. 58 G. 3. c. 69. s. 3. in the event of a poll being demanded.

3. A poll may be demanded at an election of parish officers, after the chairman has declared the result of a shew of hands.

the

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the said parish, holden at such vestry room on that day, pursuant to the provisions of the statute in such case &c., and at which meeting he the plaintiff, as one of the churchwardens of the said parish, was legally entitled to be present; and other wrongs &c.

Pleas, 1. Not Guilty.

2. That, before and at the time when &c., to wit 4th August 1835, a certain general meeting of the vestry of the said parish, convened pursuant to the provisions of the statute in that case &c., was duly assembled and holden &c., in the vestry room in the parish, for the transaction of business touching the care and management of the overseers of the parish; but that, just before the time when &c., and whilst the vestry was duly assembled and sitting in the vestry room on parochial business as aforesaid, the plaintiff, without right or authority so to do, and he the plaintiff not being, before or at the said time when &c., one of the churchwardens of the said parish, as in the declaration mentioned, nor a vestryman of the said parish, unlawfully intruded himself, entered and came, into the said vestry room, and then and there made a noise, &c., and remained therein making such noise, without the leave or licence, and against the will of the said vestry so assembled as aforesaid, and thereby greatly disturbed the said vestry so assembled; and thereupon the said *A. M. Campbell*, then being the minister and perpetual curate and one of the vestrymen of the said parish, and the said *J. Hill*, then being one of the churchwardens and vestrymen of the said parish, and the said *J. Cochrane*, being one of the beadles and constables of and for the said parish, then and there requested the plaintiff to cease from making such noise and disturbance, and to go and depart

depart &c., which he then and there wholly refused to do, and then unlawfully continued such interruption, &c., whereupon the said *A. M. Campbell*, being such minister &c., and the said *J. Hill*, being such churchwarden &c., and the said *J. Cochrane*, being such beadle &c., and as the servant of the said *A. M. Campbell* and *J. Hill*, and by their command, at the said time when &c., did gently lay their hands &c., in order to remove, and did then remove, the plaintiff, &c., as it was lawful &c. Replication, de injuriâ. Similiter.

The bill of exceptions stated as follows. The issues were tried before Lord *Denman* C. J., at the *Middlesex* sittings after *Michaelmas* term, 1835. Upon the trial, the plaintiff's counsel gave in evidence that the plaintiff, on 4th *August* 1835, was forcibly turned out of the vestry-room of the parish of *Paddington*, where a general meeting of the parish, duly convened, was then assembled and holden by order of the defendants, the plaintiff claiming to be there present as having been duly elected churchwarden of the parish on the 21st of *April*, being the *Easter Tuesday* preceding. The defendant *John Hill* also claimed to have been duly elected churchwarden, and was a vestryman of the parish. The defendant *A. M. Campbell* was minister and perpetual curate, and one of the vestrymen of the parish, and chairman of the meeting. The defendant *James Cochrane* was one of the beadles and constables of the parish, and acted, in turning the plaintiff out of the room, in obedience to the directions of the other two defendants. The plaintiff gave further in evidence an act, 5 G. 4. c. cxxvi. (a)

(the

(a) Stat. 5 G. 4. c. cxxvi. (local and personal public) is "for better governing and regulating the parish of *Paddington*," &c.

Sect. 3 enacts, that vestrymen (with the exception of certain ex officio

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(the bill here referred to ss. 3 and 10 of that act). The mode of electing churchwardens in the parish, both long before and after the passing the act of 58 G. 3. c. 69. (a), and long before, and at, and after the passing of the act of 5 G. 4. c. cxxvi., had been and was by shew of hands, no poll ever having been demanded. On the *Easter Tuesday* 1835, the plaintiff below, *Maund*, and one *Hobbs* were proposed as churchwardens, as were also one *Goodhind* and the defendant below, *Hill*. The majority of the electors present at the said meeting, on a shew of hands, was in favour of the plaintiff below and *Hobbs*, and was so declared to be by the chairman; whereupon a rate-payer present demanded

vestrymen, including the minister and churchwardens, by sect. 6, and of others nominated by particular parties) shall be chosen by ballot, by the inhabitants and occupiers qualified as hereinafter mentioned; each of whom is to be entitled to the same number of votes as under stat. 58 G. 3. c. 69. s. 3.

Sects. 8 and 9 provide for the election of future vestrymen, as in the original election.

Sect. 10 enacts, that the election of churchwardens "shall take place on *Easter Tuesday*, and be conducted from year to year in such manner as hath been usual in the same parish."

Sect. 25 enacts, that the vestrymen shall "nominate the overseers of the poor for the said parish of *Paddington*, in such manner as the inhabitants of parishes in vestry assembled are in other cases empowered to nominate them," with a proviso as to the time.

(a) Stat. 58 G. 3. c. 69. is "For the regulation of parish vestries," extending (ss. 9 and 10) to all parishes not in the city of *London* or in *Southwark*.

Sect. 3 enacts, that every rated inhabitant shall, in the vestry, have a number of votes in the proportion there assigned to the amount of property in which he is assessed.

Sect. 8 enacts, that nothing in the act shall "extend to take away, lessen, prejudice or affect the powers of any vestry or meeting holden in any parish, township or place, by virtue of any special act or acts, of any ancient and special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden."

a poll,

a poll, and required that the poll should be taken pursuant to stat. 58 G. 3. c. 69. This mode of taking the poll, giving a plurality of votes to one person according to the amount of his rateable property in the parish, was objected to by an inhabitant present, who insisted that only one single vote should be allowed to each person. On the poll being so demanded, the chairman immediately granted a poll as demanded, in pursuance of the following notice, which had been previously circulated in the parish.

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" *Paddington, Middlesex, 16th April, 1836.*

" If a poll should be demanded for the election of churchwardens on *Tuesday* next, it will be opened at the National School-Room, *Harrow Road*, immediately after the meeting of the inhabitants and occupiers, and will continue open for the convenience of the rate-payers until six o'clock on *Tuesday* evening, and likewise from eight to six on the following day, &c."

" *A. M. Campbell*, Minister.

" *Thomas France*, } Churchwardens."
" *John Goodhind*, }

The chairman withdrew, for the purpose of taking such poll, into the school-room, being at a small distance from the vestry-room, and within the parish, and more convenient for taking the poll. The poll was then and there taken according to the plurality of votes; and, upon the result of that poll, the defendant below, *Hill*, and *Goodhind* were declared duly elected, not only by a majority of votes as respecting property, but also by the plurality of single votes. The poll was kept open for two days; and all rate-payers within the parish, who had paid their taxes, were allowed to vote, whether they

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had been present or not when the candidates were proposed, and the shew of hands taken. During the taking of such poll, several of the parishioners protested against the mode in which such poll was taken; and, acting upon such protest, did not vote. All the four candidates were afterwards sworn in by the surrogate: and the plaintiff below, having come to the vestry-room on the 4th of *August*, claiming to be legally elected churchwarden by a majority on the shew of hands, but not being a vestryman of the parish, came to the said meeting, and insisted on his right to attend the same as churchwarden, against the will of the said vestry. Whereupon, having been previously requested to withdraw by the defendants below, and refusing to do so, but continuing as aforesaid, he was turned out by the defendant below, *Cochrane*, the beadle, under the directions of the defendants below, *Campbell* and *Hill*, with instruction to use no unnecessary violence. The counsel for the defendants below insisted on their behalf that the said several matters, so produced and given in evidence, were sufficient to entitle the said defendants to an acquittal on both the issues, that the poll was duly taken under stat. 58 G. 3. c. 69., that *Hill* was duly elected churchwarden, and that the plaintiff below was not duly elected churchwarden, and that the defendants below were justified, on the day when &c., in turning him out of the vestry-room for the cause aforesaid; but the counsel for the plaintiff below insisted to the contrary: and the Chief Justice did then and there declare and deliver his opinion in point of law to the jury, that, upon the evidence aforesaid, if believed, the said *James Maund* was duly elected churchwarden; that the 10th section of the

local

local act 5 G. 4. c. cxxvi. took the parish of *Paddington* out of the operation of stat. 58 G. 3. c. 69., as to the election of churchwardens by a plurality of votes in a single person by reason of rateable property in the parish : and that, a poll being demanded according to the provision of that statute, under the circumstances above stated, the chairman was not justified in holding it at all, and therefore the election must be determined by the shew of hands, the majority of single votes upon the shew of hands being allowed to be in favour of the plaintiff's election : and, with that direction, the Chief Justice left the same to the jury. Whereupon the counsel for the defendants below excepted &c. The bill stated that a verdict was found for the plaintiff below.

Joinder in error.

The case was argued on *Tuesday, November 1st, 1836*, before *Tindal C. J., Lord Abinger C. B., Park J., Bolland, Alderson, and Gurney Bs.*

Sir *F. Pollock* for the plaintiffs in error. First, it was proper, under the circumstances, that a poll should be taken. Sir *William Scott*, in *Anthony v. Seger* (a), said, as to the election of a churchwarden, "Where a poll is demanded, the election commences with it, as being the regular mode of popular elections ; the shew of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that, on a shew of hands, the person has a majority, who on a poll is lost in a minority ; and if parties could afterwards recur to the shew of hands, there would be no certainty or

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(a) 1 Hag. Ca. Cons. Court, 13.

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regularity in elections. I am of opinion therefore, that when a poll is demanded it is an abandonment of what has been done before; and that every thing anterior is not of the substance of the election, nor to be so received." Here the poll was demanded; the supposed election by shew of hands is therefore a nullity. It will, however, be contended that, either by sect. 8 of *Sturges Bourne's Act*, stat. 58 G. 3. c. 69., or under sect. 10. of 5 G. 4. c. cxxvi., or at common law, the ancient custom of taking by shew of hands, in this parish, is to be adhered to; and, therefore, that the poll was not properly demanded, inasmuch as the demand was that a poll should be taken pursuant to stat. 58 G. 3. c. 69., which, it will be argued, is inapplicable to the parish of *Paddington*. Now, supposing it, for argument's sake, to be inapplicable, the demand was nevertheless good, because the presiding officer was not prevented, by the terms of the demand, from holding it according to the legal method, whatever that was. This disposes of the case, independently of the question to be next discussed; because, if the poll was rightly demanded, then, inasmuch as *Maund*, at the poll, was in a minority, reckoning either by gross numbers, or by votes taken according to property under stat. 58 G. 3. c. 69., he was not duly elected.

But, secondly, the proper method of taking the poll was under stat. 58 G. 3. c. 69. s. 3. That applies to all parish vestries, except in *London* and *Southwark*. It is true that sect. 8 makes an exception in the case "of any ancient and special usage or custom." No such custom, however, is in evidence here. There is simply an absence of any demand of a poll; that is very different from a custom not to elect by poll, though demanded. A similar

similar answer applies to the argument which will be suggested from sect. 10 of stat. 5 G. 4. c. cxxvi. The usual manner of electing, since stat. 58 G. 3. c. 69., must be understood to have been under the last named statute; for, although that statute had not actually been called into operation, inasmuch as no poll had been demanded, yet (in default of special custom, which has not been proved here) the poll, if taken, was liable to the statute; and therefore stat. 5 G. 4. c. cxxvi. found the parish subject to stat. 58 G. 3. c. 69., and this latter act is not repealed by sect. 10. of stat. 5 G. 4. c. cxxvi. The election of vestrymen is, by sect. 3 of the local act, expressly directed to be made according to the provisions of stat. 58 G. 3. c. 69., except that it is to be by ballot. And the object of sect. 10 of the local act was merely to prevent the election of churchwardens from being subject to the changes which the act introduced as to vestrymen. The fact that stat. 58 G. 3. c. 69. had never been called into operation cannot affect the question.

Although the plaintiffs in error contend that they are entitled to succeed, even if stat. 58 G. 3. c. 69. do not apply to the parish of *Paddington*, it is the wish of both parties to obtain the judgment of the Court on the question whether it does so apply.

Sir *J. Campbell*, Attorney-General, *contra*. The question is reduced to that of the applicability of stat. 58 G. 3. c. 69. For, supposing that statute to be inapplicable, the only question, upon the shew of hands being taken, was, whether it was in favour of *Maud*. Any person, who disputed that, might call for a poll to put an end to the doubt; that is all which can be inferred from

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Anthony v. Seger (a); but the poll could be called for on that ground only. Here no such poll was demanded. In effect, the party making the demand did not dispute that the shew of hands was in *Maunder's* favour, nor require that question to be tried by the poll; but he insisted on applying stat. 58 G. 3. c. 69. [Lord Abinger C. B. Do you say that a person not present at the shew of hands could not afterwards vote on a poll being granted?] In strictness he could not. The common law assumption seems to be, that all who have a right to vote are present when the shew of hands is taken. A poll in many cases, as for instance on the question who is to be chairman (if indeed it can be taken at all on such a question), must be confined to parties present at the time when the question arises: and the law must be the same as to other questions. [Lord Abinger C. B. But there must often be a poll lasting for more days than one, as in the case of an election of a member of the House of Commons.] That is the case of a county court, which the sheriff has a common law power to adjourn. In *Prideaux on Churchwardens*, p. 46. (ed. 10., by *Tyrwhitt*), it is said that, at a vestry meeting, "the present include the absent, and the major part of the present include all the rest. For those who absent themselves after such public notice given do it voluntarily, and therefore do thereby devolve their votes upon those who are present, and every act of the major part of the present in all such meetings is, in construction of law, the act of the whole parish" (b). *Prideaux's* book was stated to be one of authority in the Ecclesiastical Courts, by Sir John Nicholl, in *Wilson v. M^cMath* (c). In

(a) 1 Hag. Ca. Con. Court, 13.

(b) And see ib. p. 70.

(c) 3 B. & Ald. 248., note (b).

Rex v. The Archdeacon of Chester (a) the churchwardens gave notice of their intention to adjourn, if a poll should be demanded, in the original notice of meeting: and Lord Denman C. J. said, "Those who summon a meeting of this kind must necessarily lay down some order for the proceedings." But that does not shew that parties who have once, by meeting, the entire cognizance of a question submitted to them, are to be afterwards interfered with by others who were not at the meeting. [Lord Abinger C. B. The practice is against your position.] The practice, if otherwise, is legal only when it takes place under act of parliament, or special custom. The presumption must be in favour of the common law practice. Here it appears that the majority of electors present were for *Maund*. Even if the common law admitted parties who were absent on the shew of hands to vote at a poll, the special usage here would overrule that; and the enactment in sect. 10 of 5 G. 4. c. cxxvi. was perhaps introduced for the very purpose of protecting the usage in that respect. [Alderson B. The contest here was between two and two, on the shew of hands; that is not a good election, according to *Rex v. Player* (b).] That may be correct, as to corporators; but the usual method of electing churchwardens is as here. It is, however, enough, in this case, that the custom in the particular parish has been followed.

Then, as to the question whether stat. 58 G. 3. c. 69. be applicable to the parish of *Paddington*. Sect. 10 of stat. 5 G. 4. c. cxxvi. provides in express terms for preserving the custom, or *lex loci*. According to the argument on the other side, this section would have been

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(a) 1 A. & E. 342.

(b) 2 B. & Ald. 707.

totally

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totally unnecessary: for it is contended that it left the elections to the existing law. [Lord Abinger C. B. The object might be to prevent the churchwardens from being elected by the select vestry, as substitute for a general vestry. Sir F. Pollock. By sect. 25 the overseers are to be chosen by the select vestry.] That shews conclusively that, independently of express enactment, the churchwardens would have been elected according to the law prevailing before the statute. The object of sect. 10 is, therefore, to provide, not merely for maintaining the law as it stood before the act, which was unnecessary, but for maintaining the method of election *de facto*, whether strictly legal or not. This is the construction which has been put on similar clauses, as in *Rex v. Birch (a)*, *The Duke of Bedford v. Emmett (b)*, *Rex v. The Churchwardens of St. James, Westminster (c)*. It is argued that the custom of voting by single votes is not shewn here, inasmuch as the plurality could take place only where a poll was taken, and a poll could be taken only where there was a demand, and the evidence merely negatives the demand. But, according to this course of argument, the evidence in support of the custom would be considered weaker, the more prevalent and notorious the custom was. That a poll was never demanded shews the strongest conceivable case of its not being usual.

Sir F. Pollock in reply. The objection to the putting up two names at once is, of itself, fatal to the Defendant in error. It is said that parties not present at the shew of hands ought not to be let in by the poll;

(a) 4 T. R. 608.

(b) 3 B. & Ald. 366.

(c) Antè, 391.

if so, the practice throughout the country is illegal. Besides, as there was here a notice of the intention to grant a poll, there was the less necessity for all the electors to attend. In *Rex v. The Archdeacon of Chester* (a) the party which had the minority on the poll had the majority on the shew of hands as here: yet the result of the poll was held to be the true election. The doctrine laid down in *Prideaux* may be correct; those present may bind those absent: but the question still remains, whether it is not the parties *present at the poll* that bind the parish. The cases cited, to shew that sect. 10 of stat. 5 G. 4. c. cxxvi. refers to the usage *de facto*, shew merely that, where a particular practice is expressly referred to as the exemplar, that must be followed: here there is nothing analogous to such a provision, but only a clause leaving matters as they stood before. It is said that, on this construction, sect. 10 would be unnecessary: but many other objects might be suggested for it; for instance, it might be meant to defeat the canonical right of the minister to elect a churchwarden (b). But here there is no custom *de facto* against the plaintiffs in error: the custom is of election by a shew of hands: to such a custom it is incidental that a poll, if demanded, should be granted. The fact that the incident is not recollected to have taken place, because never wanted, does not destroy the incident.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court. After having stated the pleadings, his Lordship proceeded as follows.

(a) 1 A. & E. 342.

(b) As to which, see *Prideaux's Directions to Churchwardens*, pp. 54, 55, and notes, ed. 10.

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The enquiry at the trial was reduced to this single question, whether *Maund*, the plaintiff below, had been duly elected churchwarden or not. The learned Lord Chief Justice told the jury that [His Lordship here read the bill, so far as related to the ruling of the Lord Chief Justice, as *antè*, pp. 870, 871.]

To this direction the defendant below excepted in point of law.

The bill of exceptions raises two points, each of which has been argued before us, viz., first, whether the election, which took place at a poll demanded and granted under the circumstances stated in the bill of exceptions, was a legal and valid election? and, secondly, whether the provisions of stat. 58 G. 3. c. 69. apply to and govern the parish of *Paddington*?

And, upon the first question, we are all of opinion that the election, which took place at the poll demanded and granted in the manner and under the circumstances stated, was a legal and valid election.

We agree to the proposition contended for on the part of the defendant in error, that, whatever was the particular mode of electing churchwardens for the parish of *Paddington* at the time of passing the local act, the same mode is still preserved and remains unaltered in the parish, by virtue of the 10th section of that act. For the provision in that section, that elections of churchwardens “shall take place on *Easter Tuesday*, and be conducted from year to year in such manner as hath been usual in the same parish,” appears to us to intend the usual and customary mode of election *de facto* observed there, whatever it might be, and without any reference to its origin or conformity with the general law.

But

But we are, at the same time, of opinion that the mode of electing churchwardens in the parish of *Paddington* set out in the bill of exceptions is not inconsistent with, nor does it by any means exclude, the right of the parishioners of *Paddington* to have recourse to a poll in the election of churchwardens for that parish.

All that is stated to have been proved to the jury is, that the mode of electing churchwardens in the parish of *Paddington* had been by a shew of hands, *no poll ever having been demanded*. There is no evidence before them of any poll having been ever demanded and refused, or of any custom or usage, in negative words, to exclude the granting of a poll when properly demanded.

The question, therefore, becomes this: whether the right to demand a poll is by law incidental to the election of a parish officer by shew of hands, where there is no special custom to exclude it?

And we think such right is, in point of law, a necessary incident, or consequence, to the mode of election by shew of hands, wherever it is not by special custom excluded. Independently of any authority upon the subject, the recourse to a poll, where the population of the parish is large, appears to be the only mode of ascertaining, with precision, the numbers of those who vote on each side, and the right of each elector to vote. Again, it is, under the same circumstances, the only mode by which each individual elector can have the power of expressing his opinion at all; for, in the case of populous parishes, no vestry-room can be large enough to contain the whole body. Still further, where the election is carried on with any warmth of popular feeling, it is the only mode by which a large portion of the

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the community can express their opinion with freedom and security. But, in addition to these general grounds, we think the authority of Lord *Stowell's* judgment, in the case (a) referred to in the course of the argument, is intitled to the greatest consideration on a matter of this nature. [His Lordship then read the passage cited, antè, p. 871.]

The right to demand a poll being therefore, as it appears to us, by the common law, an incident to the popular election of a person to an office, we think the electors cannot be deprived of it without a special custom of election inconsistent with such right, or expressly excluding it by negative terms, viz., that no such right exists in the particular parish. And we are clear that there is no such finding as the parish of *Paddington*, or facts stated which could warrant such a finding, but that the case strongly resembles that of *Doe dem. Edmunds v. Llewellyn* (b), where it was held, by the Court of Exchequer, that the finding in a special verdict, that there did not appear upon the Court rolls any entry of a surrender to the use of a will, was no finding of a custom that lands within the manor could not be surrendered to the use of a will.

But it is objected that the demand of the poll was in the present case a nullity, on two grounds; first, because it was not made until after the shew of hands was declared by the chairman to be in favour of the plaintiff, and of the candidate joined with him; and, secondly, because the demand required that the poll should be taken pursuant to the statute 58 G. 3. c. 69.

We think it an answer to the first objection, that, in

(a) *Anthony v. Seger*, 1 Hag. Ca. Con. Court, 13.

(b) 2 C. M. & R. 503. 5 Tyrwh. 899.

the nature of the thing, the demand of a poll never is, nor can reasonably be expected to be, made until the necessity for such demand arises; that is, until one of the contending parties is dissatisfied with the decision of the chairman upon the shew of hands, from which it is in the nature of an appeal. And, as to the second objection, it might be sufficient to observe that there is no evidence, in this bill of exceptions, that any one of the parishioners in vestry objected to the demand of the poll on that ground. If the granting of the poll had been objected to on that ground, and refused, the question might by possibility have arisen, whether the annexing to the demand of a poll the requisition of a particular mode of conducting it did or did not afford a justifiable excuse for the refusal to allow the poll. But, in this case, neither of the parties objected that a poll should in fact be taken. And, as, in point of fact, upon the present occasion, a poll was granted, and actually taken between the contending parties, we hold there has been a complete waiver of any irregularity in point of form in the mode of demanding the poll, even if any such irregularity had existed; which, however, we think was not the case.

But it is lastly, and indeed principally, objected that the poll was improperly taken, the electors having been allowed to have a plurality of votes according to the amount of their property as provided by the statute 58 G. 3. c. 69., and not having been each restrained to the exercise of a single vote: whereas the parish of *Paddington*, as it is contended on the part of the plaintiff below, is excepted out of the operation of that act by the tenth section of the local act 5 G. 4. c. cxxvi., so that no elector can have more than a single vote in
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the election of a churchwarden. But, as the evidence before the jury was that the defendant *Hill*, and the candidate joined with him, who were declared duly elected at the poll, were not only elected by a majority of votes with reference to property, but also by the plurality of single votes, it becomes a matter of indifference to the parties to this suit, whether the legal right of voting in the parish of *Paddington* is governed by the statute 58 G. 3. c. 69. or not; for upon neither supposition has the plaintiff below been elected to the office of churchwarden.

As, however, both the parties have been heard on this question before us, and have expressed their desire that we should deliver our opinion upon it, and as we ourselves think the expression of our unanimous opinion may have the effect of preventing any future litigation on this subject, we have thought it right to enter upon the discussion of the second question, that is, whether the mode of election by the statute 58 G. 3. c. 69. does or does not extend to the parish of *Paddington*?

This question depends for its answer on the proper construction to be put upon the eighth section of the general act, and the tenth section of the local act.

The eighth section of the general act provides [His Lordship here read the section: see p. 868, note (a) *anté*].

Now there is no special usage or custom, as to the mode of electing churchwardens in the parish of *Paddington*, found upon the bill of exceptions, where they are to be elected in vestry. The churchwardens, at the time of passing that act, were chosen by a shew of hands. So were the elective churchwardens, generally speaking, throughout most of the parishes in *England*. It is the general mode of election of churchwardens throughout the

the realm. But it is found that no poll had ever been demanded in the parish. The same may be said of very many, perhaps by far the greater part, of the parishes in *England*, in which the parishioners have never demanded a poll because they have been satisfied by the shew of hands. If the custom within the parish of *Paddington* had by negative words *excluded* a poll, it would then indeed have been a special usage or custom which would have taken that parish out of the operation of the statute; for it is obvious that an election by shew of hands alone is necessarily inconsistent with the allowance of a plurality of votes in any one person. But, if the usage or custom within *Paddington*, as set out in the bill of exceptions, should be held sufficient to exclude a parish from the operation of stat. 58 G. 3. c. 69., on the ground of its being "special," the statute would have comprehended a very small proportion indeed of the numerous parishes in *England*.

If then stat. 58 G. 3. c. 69., taken by itself, includes within its operation the parish of *Paddington*, is there any clause in the local act which can exempt the parish from its operation? The only clause which can be contended to have that construction is the tenth. [His Lordship here read sect. 10 of stat. 5 G. 4. c. cxxvi. See p. 868., note, antè.]

This clause, as we have before observed, was intended to leave the parish of *Paddington* precisely in the same condition as it was at the time of passing that act. Now what was the condition of the parish as to its mode of electing churchwardens at that time? We answer, by shew of hands, if no poll is demanded, and, if demanded, then by a poll taken according to law. Now by law, at

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that time, a poll must be taken by plurality of votes as provided by stat. 58 G. 3. c. 69., where the parish falls within the operation of that statute. And the mere fact that the votes have never been actually taken in that mode since the passing of the statute is no more a proof that the statute does not apply, than the fact of the non-demand of a poll proves that such poll was not demandable of right.

Upon the whole of this second question, we think that the mode of electing churchwardens in the parish of *Paddington*, before the passing of stat. 58 G. 3. c. 69., was by a shew of hands, with a power of going to a poll, in which case the majority of single votes decided the election. That stat. 58 G. 3. c. 69. gave each voter a plurality of votes at the poll, when demanded and held, according to the quantity of his estate; and that, such being the rightful mode of election at the time of passing the local act, it was continued and preserved to the parish by the tenth section.

We think, therefore, that, upon the present record, a judgment of venire de novo must be awarded.

Judgment of Venire de novo.

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IN THE EXCHEQUER CHAMBER.

(Error from the King's Bench.)

PITT *against* WILLIAMS and Another, Executors *Saturday,*
of THOMAS FOSTER. *November 26th.*

THE plaintiff in error declared in covenant against the defendants in error, in the Court of King's Bench. On general demurrer to the declaration, judgment was given for the plaintiff. An indenture recited that *F.* and *G.* were entitled to a fourth part of a colliery for a term of years;

that *G.* was also entitled, by agreement with *A.*, to a lease of land essential for working the colliery, and held the agreement in trust for himself and *F.* jointly; that *P.* had a power of sale upon a moiety of the colliery, for the same term, to secure an annuity, which power he was about to exercise; that *F.* and *G.* agreed to purchase the moiety, which was to be discharged from the annuity, and to grant a fresh annuity to *P.*, payable out of the profits accruing from the working the coal, by virtue of the term in the three parts of the colliery, and the agreement. By the same indenture, after such recital, the moiety was assigned and the annuity granted; and *F.* and *G.* covenanted severally for themselves, their executors, administrators, and assigns, to pay the annuity, as above, from the profits accruing, after payment of all rates, taxes, &c., and of the rents reserved on the term, or by the agreement; a right of entry on the premises charged, and of mortgage and sale, was given to *P.* on the annuity being in arrear; and *F.* and *G.* covenanted severally for themselves, their heirs, executors, and administrators (not naming assigns), to do nothing whereby the annuity might cease, determine, be impeached, or become void and of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease.

P. sued in covenant on the indenture, assigning for breaches, (1), that *F.* and *G.* took a lease of the land to which *G.* was entitled under the agreement, in their own names, and not in trust for *P.*, but for other persons, and forfeited and surrendered the agreement, whereby the annuity was impeached, and the plaintiff's right over the land, and in the profits which would have accrued, ceased; (2), that under the land subject to the agreement there were veins of coal, the property of *A.*, and that *F.* and *G.* took the land at a higher rent, and otherwise on worse terms, than *G.* was entitled to by the agreement, in order to obtain the last-mentioned coal on better terms than they otherwise could have done, whereby &c. (as before); (3), that *F.* and *G.* afterwards assigned the land, amongst other things, to *H.*, whereby &c. (as before). On general demurrer to the declaration,

Held, by the Court of Exchequer Chamber, in accordance with the judgment of the Court of K. B., that the want of an averment that profits had, or would have, actually accrued from working the colliery was no objection to the declaration.

But that the first two breaches shewed no cause of action; for that, (1), the variation between the lease and the agreement did not invalidate the security; and, (2), the security was not shewn to be affected, since the profits of the colliery on which the annuity was secured were those remaining after payment of such rent only as was reserved by the agreement.

But held, reversing the judgment in K. B., (3), that the third breach shewed that the annuity was impeached; since the land in *H.*'s hands would not be subject to the powers of entry, mortgage, and sale; *H.*'s interest not being that which the covenantors had under the agreement, and he appearing to come in as a purchaser, nor privy to the covenant, and not estopped by it.

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ment was given for the defendants in *Hilary* term, 1835. See the pleadings, arguments, and judgment, 2 *A. & E.* 419.

Error was brought in the Court of Exchequer Chamber on the judgment; and the case was argued, *Tuesday, May 10th 1836*, before *Tindal C. J., Park, Gaselee, and Bosanquet Js., and Bolland, Alderson, and Gurney Bs.*

Sir *W. W. Follett*, for the plaintiff in error. There is no distinct or personal grant of the annuity by the covenantors to the plaintiff, but merely a charge upon the profits. The annuity, therefore, is impeached, within the meaning of the covenant, if the plaintiff is in any way hindered in obtaining the money; and there is also a covenant to do nothing whereby the indenture of lease, or the articles of agreement, shall be forfeited, or the terms of years thereby created shall become void. Now the annuity is charged, with powers of entry and sale, on all "the profits, benefits, and advantages whatsoever, and sum and sums of money, if any, which, under the said thereinbefore in part recited indentures of lease and the said agreement of 8th *August 1816*, and the powers, provisoes, covenants, and agreements therein respectively contained, should or might be made, accrue," &c., "by the sale of the coal or culm to be wrought out of the said mines and veins" &c., "as aforesaid, or otherwise howsoever." And the covenantors in fact do forfeit the articles of agreement, and assign away the term of years granted in pursuance of the articles. [*Bosanquet J.* The agreement from Lord *Ashburnham* was to grant a lease after the shipping place should be completed.] In that respect, it is like an ordinary building lease; but it is enough, for the purpose of the
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present argument, that the agreement was the subject of the covenant. As long as *Gaunt* was the party holding an interest in the agreement, the land, to the extent of his interest, would be liable to the covenant, by way of estoppel. But, after the agreement was given up, and the lease made to *Foster, Bonner, and Gaunt*, and by them assigned to *Hill*, the land in *Hill's* hands would no longer be subject to the power of entry and sale. A party can grant no interest in land in which he himself has no vested interest; *Right dem. Jefferys v. Bucknell* (a), *Yelverton v. Yelverton* (b). But the judgment below assumes that the land in *Hill's* hands would be liable to the covenants. This is incorrect, both on the grounds just urged, and because "assigms" are not named in the covenant not to impeach; *Spencer's Case* (c). Besides, the lands are taken away, by the assignment to *Hill*, from the parties who are to work the colliery. Independently of the assignment to *Hill*, the giving up the agreement for a lease on worse terms than those contained in the agreement is a clear impeachment of the annuity charged on the interest of *Gaunt* in the agreement.

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Sir John Campbell, Attorney-General, contra. The plaintiff, not being able to allege that any profits in fact have arisen, has had recourse to the covenant not to impeach. But no one breach shews that the annuity has been impeached. The first breach shews merely that the lease has been granted to the three instead of being granted to *Gaunt* only, who held the agreement in trust for the three. But that does not impeach the

(a) 2 B. & Ad. 278.

(b) Cro. Eliz. 401.

(c) 5 Rep. 16 a.

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annuity. It is true that the lease is not granted in trust for the plaintiff: but that was not covenanted for. Then it is said that the agreement was forfeited. In the sense in which it has been forfeited, that is, by accepting a performance of it, the intention always was that it should be so forfeited; it is not against such a forfeiture that the parties covenant. With respect to the second breach, the annuity was payable out of the profits which should accrue after discharging rates, taxes, &c., and the rents reserved on the then term, or by the then agreement: it is therefore not impeached by an increase in the new rent. As to this, it is sufficient to refer to the ground taken in the judgment of the Court below. As to the third breach, it is to be observed that there is no covenant against assigning. The parties might therefore assign all or any part. It is said that the severance of the lands from the colliery impeaches the rent. But the declaration shews no severance; for, if issue had been taken on the fact of the assignment, an assignment of all together would have supported the issue on the part of the plaintiff: and, again, the defendants could not, on this declaration, take issue, and conclude to the country, as to the fact of the severance. Then is the annuity impeached by the assignment of all together? It is not necessary to discuss the decisions as to estoppel; it is enough that *Hill*, taking under the covenants, took subject to their covenants in matters relating to the land and running with it; for which purpose the assigns need not be named in the original covenant. Besides, the covenant to pay does name the assigns of the covenantors. And this shews that an assignment was contemplated. If, in fact, there had been any impeachment of the annuity, or if any consequence

sequence had followed from the assignment, whereby the surplus profits, which would otherwise have satisfied the annuity, had been diminished so that they could not satisfy it, that should have been averred, and then an issue might have been taken upon such averment. On this point, the authorities cited below are applicable.

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Sir *W. W. Follett* in reply. It is true that the first breach is not good, for the reason assigned; inasmuch as an agreement for a lease is not forfeited by taking the lease agreed for. The fallacy in the answer suggested as to the second breach consists in assuming that the profits spoken of are merely the profits arising from the mine, whereas they are the profits arising in any way from all the interest in whatever is the subject of the indentures or agreement. If they had been the profits on the land alone, without the colliery, then taking the land at a higher rent would of course diminish the profits, the landlord's right of distress being for a larger sum than that in the agreement: and the joining the colliery can make no difference as to this. As to the severance, the declaration alleges that the land has been let: if the colliery has been let at the same time, that is a substantive act which it lies on the defendant to assert, not on the plaintiff to negative. [*Tindal* C. J. Perhaps that course of argument might be used, if you were declaring on a covenant not to assign: but here you call on us to infer an injury from the fact that the land is assigned. *Alderson* B. Suppose there were a covenant not to assign *Blackacre* without assigning *Whiteacre*: could you shew a breach by simply averring an assignment of *Blackacre*?] That is not an analogous

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case: the complaint here is that land essential to the working of the colliery has been assigned away. But, assuming that there has been no severance, the covenant enabling the Plaintiff to enter and sell becomes of no avail by the assignment to *Hill*, on the grounds before stated. The interest which the covenantors had by the agreement (whether that were merely equitable, or whether the agreement amounted to a lease,) is not that which has been assigned to *Hill*; and the land in *Hill*'s hands is therefore not subject to the covenant. On this point *Right dem. Jefferys v. Bucknell* (a) and *Yelverton v. Yelverton* (b) are conclusive. *Hill* is a purchaser for a valuable consideration without notice. Even if there were a grant, instead of a mere covenant, it would not bind the land in *Hill*'s hands.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.

This is an action of covenant, brought upon an indenture bearing date the 2d December 1816, containing the grant of an annuity to the plaintiff by *Foster* (the defendants' testator), and two other persons, *Bonner* and *Gaunt*, the annuity being made payable out of the three fourth parts or shares of the said *Foster*, *Bonner*, and *Gaunt*, of and in the profits, benefits, and advantages whatsoever, and sum and sums of money, if any, which, under and by virtue of certain recited indentures of lease of the 19th September 1807, and the 30th January 1812, and certain recited articles of agreement of the 8th August 1816, and the powers, provisoes, covenants,

(a) 2 B. & Ad. 278.

(b) Cro. Eliz. 401.

and

and agreements therein respectively contained, should or might be made, accrue, or be produced, by the sale of the coal and culm to be wrought and dug out of the said mines, and veins or seams of coal and culm, as aforesaid, or otherwise, howsoever, after payment of all rates, &c. It appeared, by the recitals in the indenture upon which the action was brought, that *Foster, Bonner, and Gaunt* were possessed of three fourths of the premises demised by the two indentures of lease above-mentioned, the remaining one fourth being in *George Bowser*; and that *Gaunt* held the agreement (to which *Foster, Bonner, and Bowser* were also parties), dated the 8th of *August* 1816, being an agreement from Lord *Ashburnham* for a lease of land to be granted to *Gaunt* for sixty years, as soon as he should have completed a shipping place on the said land, which land was stated to be *essential and absolutely necessary* for the working and carrying off the coal and culm to be wrought and raised out of the colliery and premises; and that *Gaunt* had covenanted and declared that he held the last-mentioned agreement in trust for the joint use and benefit of the said *Gaunt, George Bowser, Foster, and Bonner*, as tenants in common. The deed contained a several covenant, by each of them, the said *Foster, Bonner, and Gaunt*, for payment of the annuity out of their three-fourths of the profits which should be made under the said leases, and the said agreement of the 8th of *August* 1816, and the powers therein contained; and it also contained a power, in case the annuity became in arrear for a certain period, to enter upon and hold the premises thereby charged with the annuity, and a further power to mortgage or sell the same. The deed then contained several covenants by each of them, *Foster, Bonner,*

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Bonner, and *Gaunt*, that they had not done or suffered any thing to be done, whereby the mines and premises were or could be impeached or incumbered in title, estate, or otherwise: and also the following covenant, upon which the plaintiff declares, viz., that each of them, the said *Bowser*, *Foster*, *Bonner*, and *Gaunt*, so far as related to his own acts and deeds, and not further or otherwise, did for himself, &c., covenant, promise, and agree to and with the other and others of them, and also to and with the plaintiff, that the said *Bowser*, *Foster*, *Bonner*, and *Gaunt* had not made, done, committed, or executed, nor should nor would, at any time or times thereafter, make, do, &c., or permit and suffer, &c., any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said annuity thereby covenanted to be paid, was, could, should, or might cease, determine, *be impeached or become void and of no effect*, or whereby, or by reason or means whereof, the same indenture of lease and articles of agreement, or any of them, was or were, or should or might be, forfeited, and the terms of years thereby respectively created, cease, determine, and become null and void.

The declaration then states three breaches of the covenant, upon all which breaches the Court of King's Bench has given judgment in favour of the defendants below. As we concur in opinion with the Court below in the judgment given with respect to the first two breaches, it will be unnecessary to state those breaches with any further particularity, than to observe that the second breach contained an allegation which is referred to in the third, namely, that *Foster*, *Bonner*, and *Gaunt*, on the 28th *February* 1820, accepted a lease from Lord *Ashburnham* of the lands and premises agreed to be demised

demised by the articles of 8th of *August* 1816, and also obtained from Lord *Ashburnham* a lease of certain veins and seams of coal and other minerals lying under and near to the lands and premises agreed to be demised by the articles of the 8th of *August* 1816, and near to the colliery and premises originally demised to *Bowser*, and convenient for working the same. The third breach then alleges that, after the making of the two last-mentioned leases by Lord *Ashburnham*, *Foster*, *Bonner*, and *Gaunt*, without the knowledge or consent of the plaintiff, assigned to one *Charles Hill* (amongst other things) all the messuages, lands, grounds, veins of coal, and other premises granted by those two leases, and all their interest in the thereby assigned property, to hold to *Hill* for the residue of the several terms, by means whereof the annuity became and was *impeached* and of no effect.

On the part of the plaintiff it was contended, in the first place, that, as the *lands* comprised in the articles of agreement and the subsequent lease granted thereon by Lord *Ashburnham*, were in the indenture and in the declaration stated to be essential and absolutely necessary for the working and carrying off the coal and culm to be wrought and raised out of and from the said colliery, and that the same are of little or no value without such lands and premises, so, the assignment of these lands and premises to a stranger, by *Foster*, *Bonner*, and *Gaunt*, must necessarily prevent the working of the colliery and the making of any profits, and so *impeach the annuity*, by preventing the fund, out of which payment is to be made, from ever arising.

The answer given to this argument by the Court of King's Bench is stated to be, that the assignment of the
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lands to *Hill* is alleged to be made "amongst other things," which might include the colliery itself; and that it ought to have been affirmatively shewn in the breach that the colliery and the lands had become separated: whereas, for any thing that appears to the contrary, the whole might be in *Hill's* hands, and the lands might have been all along, and might at this moment be, used for the working of the colliery, and all the plaintiff's remedies may be as complete as if no assignment had been made to *Hill*.

But it was contended, on the part of the plaintiff, secondly, that, even supposing the assignment to *Hill* to include the whole premises, that is, both the colliery and the land mentioned in the articles of agreement, so that there was no severance, still it amounted to a breach of the covenant not to do any act whereby the annuity might be impeached: and it was argued that this depended on the question, whether the profits of the colliery in the hands of an assignee were chargeable with the annuity, and whether the grantee of the annuity could enter upon the assignee, so as to receive the profits, and, if necessary, to mortgage or sell the colliery under the provisions of the indenture. Upon this question the Court of King's Bench have decided in favour of the defendant, on the ground that the power to enter and mortgage or sell was not made to depend upon the colliery continuing in the possession of *Foster*, *Bonner*, and *Gaunt*, but on the annuity being in arrear, in whosoever hands the colliery might be.

We are obliged to differ from the Court of King's Bench in opinion upon this point. The interest of *Foster*, *Bonner*, and *Gaunt* in the land mentioned in the breach was, at the time of entering into the covenant

in

in question, only an equitable interest, founded on the agreement with Lord *Ashburnham* to grant a lease to *Gaunt*, which lease he, *Gaunt*, had covenanted to hold for the joint use and benefit of *Gaunt*, *Bowser*, *Foster*, and *Bonner*, as tenants in common. After the grant of the annuity, and the entering into the covenant, an actual lease was granted by Lord *Ashburnham* to *Foster*, *Bonner*, and *Gaunt*, thereby converting the equitable interest into a legal estate in the land for a term of years, which lease is alleged in the breach to have been assigned to *Charles Hill*. Under these circumstances, it appears to us that the power of entry, and of mortgage and sale, cannot be enforced against *Hill*, as to the lands contained in the agreement with Lord *Ashburnham*, and subsequently demised by him to *Foster*, *Bonner*, and *Gaunt*; for the interest which *Hill* has taken in the lands by the assignment to him of the lease granted to *Foster*, *Bonner*, and *Gaunt*, subsequently to the covenant, is not the same interest which *Foster*, *Bonner*, and *Gaunt* had in those lands under the agreement. It is an interest newly created since the covenant. *Hill* is not the assignee of any estate in the lands, to which the power of entry and of mortgage and sale, contained in the indenture, can attach. So that, supposing both the colliery and lands to have been assigned to *Hill*, the power of entry and mortgage and sale might be enforced against him, so far as regards the colliery, but could not be so with respect to the land: and, although *Foster*, *Bonner*, and *Gaunt*, might be prevented by estoppel from contending that the power of entry, mortgage, and sale did not extend to the land, still such estoppel cannot be held to bind *Hill*, who comes to the legal estate as a purchaser by assignment, and, for any thing

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 against
 Williams.

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thing that appears upon this record, without being privy to the covenant of *Foster, Bonner, and Gaunt*, by which the power was given. (See the judgment of Lord *Tenterden* in the case of *Right dem. Jefferys v. Bucknell (a).*) Upon the whole, therefore, as it appears upon the record that the land is essential and absolutely necessary to the working of the colliery, the power of entry, and of mortgage and sale, becomes nugatory if it is confined to the colliery and does not extend to the land; and such, for the reason before given, appears to be the case in consequence of the assignment to *Hill*. The necessary consequence of this must be to prevent the raising of the profits of the colliery, that is, in other words, to impeach the annuity. For there is no necessity to confine the meaning of the term "impeachment" to an impeaching of the title to the annuity; but any thing that operates as a "hindrance, let, impediment, or obstruction" to the making of the profits, out of which the annuity is to arise, appears to us to amount to an impeachment thereof.

For these reasons, we think that the judgment of the Court below must be reversed, and that our judgment must be given for the plaintiff.

Judgment reversed.

(a) 2 B. & Ad. 278.

AN

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III. Bad affidavit to hold to bail, how to be taken advantage of.

An affidavit to hold to bail, in an action against the drawer of a bill of exchange, is bad if it omit to state the amount for which the bill is drawn, and allege merely that defendant is indebted to plaintiff, in a sum named, for principal monies due on a bill of exchange, drawn by, &c. (adding the parties). Per Lord Denman C. J.

Per Curiam, this objection comes too late, where the party was detained on a *capias* issued on October 26th, and does not move to be discharged out of custody till November 14th, although

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no step has been taken by either party in the meantime.

Delay in taking such an objection is not excused by the fact that the party has been in custody ever since.

Semble, per Lord Denman C. J., that, if a Judge is applied to at chambers to discharge on account of irregularity in the affidavit of debt, and refuses to interfere, and an application is afterwards made to the Court for the same purpose, the motion, in point of form, should be, to discharge the Judge's order. *Fowell v. Petre*, 818.

ASSIGNMENT.

I. For benefit of creditors, what good as against creditors who do not execute.

An assignment to trustees for the benefit of all creditors who may execute the deed, is not valid, as against creditors who do not execute, if it authorise the trustees to carry on the debtor's trade, and contain such terms that the creditors subscribing would become partners in the business.

The trade in question being that of an hotel keeper, it is no objection to such an assignment that the debtor, when it was executed, had not a licence for retailing exciseable liquors; there being no evidence that the trustees contemplated selling, or in fact sold, any liquors without such licence, and a licence having been procured two days after the execution of the deed. *Owen v. Body*, 28.

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ATTORNEY.

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all things, should pay 500*l.* as liquidated damages.

The arbitrator awarded that defendant should, within a time named, put the premises in good and tenantable repair to the satisfaction of *M.*, and on a later day named execute a lease to the plaintiff, containing a covenant by plaintiff to keep in repair, and that plaintiff should accept a lease on those terms, and execute a counterpart.

Plaintiff declared in covenant, reciting as above, and averring that defendant had not put the premises in good and tenantable repair to the satisfaction of *M.*, or in any other manner, nor executed a lease on the terms, &c., or any other lease. Breach, non-payment of the 500*l.*

On general demurrer, held a bad declaration, the award being bad as to the delegation to *M.*, and that part not separable from the rest of the award. *Tomlin v. Mayor of Fordwich*, 147.

II. Revocation of submission: to what cases stat. 3 & 4 W. 4. c. 42. s. 39. extends.

Stat. 3 & 4 W. 4. c. 43. s. 39., which takes away the power of revoking a submission to arbitration, does not extend to a reference, agreed to on the trial of an indictment; but, where such reference has been made at nisi prius, with a proviso for making the order a rule of Court, either party may, by himself or attorney, still revoke his submission.

The Court, however, will not, upon such revocation, make a rule to restrain the arbitrator from proceeding. *Rex v. Bardell*, 619.

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Defendant having been arrested, and executed a bail-bond, obtained a summons for time to put in bail above. Pending the summons, but more than eight days after the arrest, he put in bail, who were excepted to, and did not appear on the day of justification, whereupon the plaintiff, on that day, took an assignment of the bail-bond; after which, on the same day, the bail above, whose names continued on the bail-piece, rendered the defendant.

Held, that they might do so; and, the plaintiff having served a writ of summons in an action on the bail-bond, the Court set it aside.

At the time when the writs were served, there had been no affidavit made of notice of render having been given, nor had an exoneretur been entered on the bail-piece: Held, that these steps were not necessary for the purpose of exonerating bail to the sheriff, bail above having been put in, and a render made. *Rosburgh v. Cresswell*, 829.

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In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby consignor lost his goods, it is not sufficient to prove that they never reached their destination or were accounted for. The office-keeper's duty is to deliver to a carrier; and some evidence must be given, shewing specifically a breach of that duty.

A tradesman, having made up goods

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by order, delivered them at a booking-office, with the customer's address, and booked them, to be forwarded to him, not specifying any particular conveyance, and no particular mode of transmission having been pointed out by the customer. Quere, whether the consignor could maintain an action against the office-keeper for a negligent loss of the goods while under his charge? *Gilbart v. Dale*, 543.

II. Contract made with public by stage coach proprietors.

Plaintiff sent a parcel, directed to a person in *London*, to the postmaster of *Bradford*, to be forwarded to *Melksham*. The postmaster received 2d. to book the parcel, and sent it by a mail cart to the *King's Arms Inn* at *Melksham*. He was accustomed so to take in parcels for the mail cart. The innkeeper at *M.* booked the parcel for *London*, charging 2d. as "booking" for his own trouble, and also charging on the parcel the demand for carriage from *Bradford*, which he had paid. He forwarded the parcel by a mail coach, of which the defendants were proprietors, to *London*. Several coaches used to stop at the *King's Arms*; the mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-office was kept at the *King's Arms*. The parcel was lost.

Held, first, that, for the purpose of taking in the above parcel, the *King's Arms* was a receiving house of the defendants, within stat. 11 G. 4. and 1 W. 4. c. 68. Secondly, that the plaintiff might properly sue the defendants on a contract to carry from *Melksham* to *London*.

The defendants pleaded non-assumpsit, and that the parcel contained property within the description in stat. 11 G. 4. and 1 W. 4. c. 68. s. 1., above the value of 10*l*; that it was not delivered at a receiving house of the defendants, but to their servant; and that plaintiff did not, at the time of delivering the same to such servant, declare the value of the parcel, nor did he ever pay any increased rate of charge for it. Replication, de injuriâ. The jury found that the

the house was a receiving house of the defendants, and it appeared that no notice was affixed there pursuant to sect. 2. of the statute. The defendant, in moving for a new trial, contended that, independently of the enactments in those sections, the plaintiff could not recover, not having declared the value of the parcel to their servant, and such declaration being, by sect. 1., a condition precedent to the recovery of damages for loss of any goods there mentioned, exceeding 10*l.* in value.

Held that, on the third plea, and the finding of the jury, this objection could not be maintained.

And that, since the new rules of pleading, *Hil. 4 W. 4.*, such defence was not open on non-assumpsit. *Sym v. Chaplin. 634.*

III. What is a receiving house within stat. 11 *G. 4.* and 1 *W. 4. c. 68.* *Antè, II.*

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V. When consignor bound to declare value of goods. *Antè, II.*

BANKRUPT.

I. When entitled to a meeting of commissioners to obtain his discharge from custody.

If a party committed by a subdivision court in bankruptcy for refusing to answer, obtain a habeas corpus to be brought again before the court, and give notice that he is ready to answer, he is not entitled to a meeting for that purpose, without paying the costs of the sitting. Although he make affidavit of his inability to pay. *In re Stockwin, 266.*

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I. To what sessions application for order of filiation to be made.

The sessions made an order of filiation, subject to the opinion of this Court on a case stating that the child was born on 16th *August* and became chargeable on 29th *September*; that the sessions next after 29th *September* were held on 13th *October*, that no application was made by the overseers till the *January* sessions following, nor any notice served on the party charged till *December*, and that the sessions considered the application made in time, and that it was not necessary for the officers to shew that they had made diligent inquiry as to the father before the *October* sessions:

Held that, on the case so stated, the order was bad under stat. 4 & 5 *W. 4. c. 76. s. 72.*, no excuse appearing (if any could be admissible) for the application not having been made at the *October* sessions. *Re v. Heath, 543.*

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The indorser of a promissory note does not stand in the situation of maker relatively to his indorsee.

The indorsee of a note cannot declare against his indorser as maker, even where the latter has indorsed a

note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the original maker. *Gwinnell v. Herbert*, 436.

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I. Proceedings previous to application for.

1. Notice by parish under st. 13 G. 2. c. 18. s. 5.

For obtaining a certiorari on behalf of a parish, to remove an order of sessions, a notice to the justices, signed by the attorney for the parish, stating the intention of the parish to apply for such writ, is a sufficient notice by the "party or parties suing forth the same," within stat. 13 G. 2. c. 18. s. 5.

The recognisance, under stat. 5 G. 2. c. 19. s. 2., for prosecuting such appeal, must be entered into by one or more of the inhabitants on behalf of themselves and the other parishioners, and also by sureties.

Where a certiorari had been allowed on an insufficient recognisance (it being given merely by two persons appearing on the recognisance to be inhabitants of the parish), this Court refused to quash the certiorari, but quashed the

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allowance, and enlarged the return to the writ, sending the writ back to the sessions, in order that it might be duly allowed, after the parties prosecuting the writ should have entered into a proper recognisance. *Rex v. Abergele*, 795.

2. Recognisances under stat. 13 G. 2. c. 18. s. 5., who to enter into. *Ante*, 1.

II. What to be shewn on application for.

A defendant, applying to remove an indictment from sessions by certiorari, on account of the probability that difficult points of law will arise, must state in his affidavit specific grounds on which legal difficulties will occur; it is not sufficient to shew that the obstruction complained of by the indictment consists of buildings of great value, which have stood thirty or forty years. *Rex v. Joule*, 559.

III. To remove justices' order for stopping highway, time allowed for. *Highway*, II., 1, (1).

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V. When party entitled to have writ quashed.

A party indicted at sessions for obstructing a highway obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial at a subsequent session. The prosecutor attended with his witnesses, and, on the last day of the sessions, before the case was called on, the defendant lodged his certiorari. This Court, under all the circumstances, quashed the certiorari, and ordered a procedendo. But,

Held, that this Court had no power to give the prosecutor his costs of attending at sessions after the issuing of the certiorari. *Rex v. Higgins*, 554.

VI. Certiorari on insufficient recognisances. *Ante*, I, 1.

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- I. Power of justices to imprison.

Under stat. 17 *G. 3. c. 56. ss. 1, 2, 20, 22*, two justices may convict and sentence to imprisonment and hard labour; and the party convicted may appeal to sessions, giving notice to the justices at the time of conviction, and at the same time entering into recognisance, with sufficient sureties, to try the appeal and abide the judgment of sessions; but, if he do not at such time enter into such recognisance, the convicting justices are to commit him till the sessions, unless such recognisance be sooner entered into, and are to transmit the conviction to the sessions; and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and, if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation.

A party convicted by two justices, and sentenced to eleven weeks' imprisonment and hard labour, gave notice of appeal, and was committed for not entering into recognisance. By the practice of sessions, the appeal is to be entered, and the order for hearing it obtained, by the party disputing the conviction. The party not having entered the appeal, the sessions discharged him.

Semble, that the convicting magistrates had no longer power to commit in execution of the conviction.

But held that, at any rate, no mandamus should be granted to compel them to do so. *Rex v. Twyford*, 430.

- II. Proceedings on appeal against. *Anté*, I.

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Remedy by one of two coparceners for breach of covenant by tenant. *Landlord and Tenant*, III.

COPYHOLD.

I. Who to be admitted on disputed title.

Where two adverse parties claim title, as devisees, to the same copyhold tenement, the steward may admit both, and, proper grounds being shewn, this Court will require him by mandamus so to do. *Rex v. Lord of Manor of Hexham*, 559.

II. How far admittance affected by imperfect title of lord.

Copyhold property, in a manor belonging to the see of *Ely*, was surrendered to *B.*, who was admitted on this surrender, at a court purporting to be a court of *J. Bishop of Ely*, lord of the manor. At the time of the admission, no grant of the temporalities had been made to *J.* since the death of the preceding bishop; nor had *J.* been confirmed. Held, that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act, but in pursuance of a surrender. *Doe dem. Burgess v. Thompson*, 532. (See remainder of placitum, *Ejectment*, II., 2.)

III. Custom as to person to take surrender.

A surrender of copyhold lands in the manor of *F.* was proved to have been taken by *S.*, who stated that he held the office of clerk of the castle of *F.*, which was in the manor, by patent from the lord; that there was a custom for him to take surrenders; that the steward also took them, and that he, *S.*, had a concurrent jurisdiction with the steward. The patent contained no authority to that effect. Held, evidence for a jury that *S.* was entitled by custom to take the surrender. *Doe dem. Stikwell v. Mellesh*, 540.

IV. Devise of, without admittance and surrender. *Devise*, II.V. To what devises stat. 55 G. 3. c. 192. extends. *Devise*, II.

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I. Power of Court of K. B. to restore name to Burgess list.

On the revision of a Burgess list, under stat. 5 & 6 W. 4. c. 76. s. 18., the mayor expunged a name. In the succeeding mayoralty, before fresh assessors were elected, application was made for a mandamus to restore the name, on a suggestion that the objection was invalid.

Held (before stat. 7 W. 4. and 1 V. c. 78.), that this Court had no power to grant such a mandamus. *In re The Mayor of Hythe*, 832.

II. Custom of city of London as to election of alderman, whether good. *Custom*, III.

III. Bankrupt, how far disqualified from holding office of councillor.

An uncertificated bankrupt is not disqualified from being elected a councillor for a borough, and holding the office, under stat. 5 & 6 W. 4. c. 76., unless he became bankrupt while holding. *Rex v. Chitty*, 609.

IV. Funds of, for charitable purposes. *Statute*, XXXV., 5.V. Quo warranto to member of corporation on grounds affecting whole corporate body. *Quo Warranto*, 2.VI. Municipal Corporation Acts. *Statute*, XXXV. and XXXVI.

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I. Of action.

1. Of different issues.

(1.) To a declaration in two counts, defendant pleaded two pleas to the first count, and one to the second. Issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to. The plaintiff took the issues of fact to trial, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed; and for the defendant on the issue on the second count. Afterwards, on the demurrer to the other

other plea to the first count, the defendant had judgment.

Held, that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded, including (in addition to the pleadings) briefs, witnesses, &c.

And that no objection arose from his having tried the issues in fact before that in law, especially as a Judge at chambers had refused an application by the defendant to order the trial of the issues in fact to be postponed till judgment was given on the demurrer. *Bird v. Higginson*, 83.

(2.) Where two defendants in trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon all the issues, the other upon one only, each defendant is entitled to his separate costs of the issues on which he has succeeded, and an aliquot part of the joint costs, unless the Master is satisfied that, by reason of special circumstances, less ought to be allowed to either.

The defendants in such a case having appeared by separate attorneys and counsel, but the attorneys being members of the same firm, and the briefs and evidence substantially the same, the Master taxed the costs as if the parties had appeared by the same attorney. Admitted, that the taxation, in that respect, could not be disturbed.

A landlord sued in trespass for an irregular distress, and obtaining judgment against the plaintiff, may recover double costs under stat. 11 G. 2. c. 19. s. 21, though he has pleaded specially. *Gambrell v. Earl of Falmouth*, 403.

2. After special finding indorsed on record under stat. 3 & 4 W. 4. c. 42. s. 24. *Statute*, XXXI., 2., (1.)

3. Under stat. 43 Eliz. c. 6.; what constitutes an interest in land.

A right to take water from a well by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land. Therefore, where nominal damages had been recovered in an action for disturbing such a right (on an issue traversing that the plaintiff was entitled to the use of the well in manner, &c.), and the Judge at Nisi Prius certified that the damages were under

40s., it was held that the plaintiff was entitled to his full costs under stat. 43 Eliz. c. 6. s. 2. *Tyler v. Bennett*, 577.

4. When on new trial defendant suffers judgment by default. *Evidence*, III. and IX., 2.

5. Defendant's costs under st. 43 G. 3. c. 16. s. 3.

Plaintiff held defendant to bail for a debt sworn to be 20*l.* 2*s.* 1*d.* The demand consisted of many items, none exceeding 12*s.* in amount. Defendant pleaded, 1. Part payment. 2. Infancy; and no other plea. Defendant traversed the payment, and rejoined, to the second plea, that the goods were necessities. On the trial, defendant failed as to the plea of payment, and, the Judge leaving it to the jury whether the goods supplied were necessities, the plaintiff had a verdict for 10*l.*, being the whole of his claim for those articles of which he had proved the delivery:

Held, that defendant was entitled to costs under stat. 43 G. 3. c. 46. s. 3., though plaintiff, upon the motion, put in affidavits to shew that goods had been supplied to the whole amount claimed (which defendant, in general terms, denied), and though the affidavits stated that plaintiff's failure to prove his whole demand at the trial was owing to a part of the goods having been delivered by himself. *Ballantyne v. Taylor*, 792.

6. Double costs under stat. 11 G. 2. c. 19. s. 21. *Antè*, I. 1. (2).

II. Of motion to enter judgment after special finding by jury. *Statute*, XXXI. 2. (1).

III. Of rule for new trial. *Evidence*, IX. 2.

IV. Of mandamus under stat. 1 W. 4. c. 21. s. 6. *Statute*. XLI.

V. In Court below after removal of proceedings by certiorari. *Certiorari*, V.

VI. Of meeting of commissioners of bankrupt, held at the instance of the bankrupt. *Bankrupt*, I.

COVENANT.

I. How far Court will put a construction on technical words used in a covenant. *Evidence*, V.

- II. What amounts to waiver of forfeiture for breach of covenant. *Landlord and Tenant*, III.
- III. How far one of two co-parceners can take advantage of breach of covenant by tenant. *Landlord and Tenant*, III.
- IV. When breach of covenant sufficiently shewn on pleadings. *Pleading*, VIII.
- V. Breach of covenant in preventing tenant from taking possession, how to be averred in pleading. *Landlord and Tenant*, V.

COURT.

- I. Consistory. See *Consistory Court*.
- II. Ecclesiastical. See *Ecclesiastical Court*.

CREDITORS.

Assignment for benefit of, what good as against creditors who do not execute. *Assignment*, I.

CRIMINAL INFORMATION.

See *Information, Criminal*.

CROWN.

How far mandamus lies against officer of crown. *Mandamus*, II., 4.

CUSTOM.

- I. In a manor to surrender lands in trust. *Error, Writ of*, I.
- II. As to taking surrender in a manor, how shewn. *Copyhold*, III.
- III. Of city of *London*, as to election of alderman.

A custom of the city of *London*, for the Court of Mayor and Aldermen to examine and determine whether or not a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their discretion and sound consciences, a fit and proper person and duly qualified, is a valid custom.

So a custom, that, when the inhabitants of any ward shall three times return to the said court the same person to be alderman, who shall be by the

said court, according to the former custom, adjudged on such three returns, according to the discretion and sound consciences of the mayor and aldermen, not a fit person to support the dignity and discharge the duties of the office, the mayor and aldermen may, for remedy thereof, nominate, elect, and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward.

The latter custom is not abrogated by stat. 11 G. 1. c. 18. s. 7.

Nor by the by-law of the city, 13 Ann., "for reviving the ancient manner of electing aldermen," which, (after reciting that, by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants of that ward, having right to vote, were wont to choose one person only, being a citizen and freeman, to be alderman of the ward,) enacts that, for reviving that custom, and restoring to the inhabitants their ancient right of choosing one person only to be their alderman, there shall from thenceforth, in all elections of aldermen of the city, at a wardmote to be holden for that purpose, be elected, according to the said ancient custom, only one able and sufficient citizen and freeman, to be returned to the Court of Mayor and Aldermen, which person so elected shall be by them admitted and sworn.

On quo warranto for exercising the office of alderman of *London*, the defendant pleaded the two first-mentioned customs, and that, *M. S.*, being three times returned by the ward, and adjudged unfit by the mayor and aldermen, they elected the defendant. The relator took issue upon the existence of the customs, and replied that *M. S.* was a fit &c., upon which issue was joined. The jury having found the customs, the Judge, without consent of parties, discharged the jury from giving a verdict on the issue as to the fitness &c. of *S.*

Held, that he might properly do so. *Rez v. Johnson*, 488.

- IV. Local custom as to interpretation of technical words in a covenant, how far binding on covenanting parties. *Evidence*, V.

CUSTOMS.

CUSTOMS.

Mandamus to commissioners of, to deliver up goods. *Mandamus* II., 4.

DAYS.

Half holidays at sheriff's office, how counted. *Scire Facias*, I., 1.

DEMAND.

What amounts to demand and refusal. *Mandamus*, I., 5.

DESCENT.

Effect of partition by parceners upon the descent. *Parcener*, I.

DETENTION.

Unlawful detention, when it satisfies averment of unlawful taking. *Replevin*, I.

DEVISE.

I. What words create an estate for life.

1. Testator devised lands to trustees to raise an annuity for his widow, and, subject thereto, to the use of testator's son *William*, for life; remainder to trustees to preserve &c.; remainders to the use of *William's* first, second, and every other son successively in tail male; and, on failure of such issue, then (subject to a further annuity for the widow) to the use of his grandson *J. G.*, the son of his late daughter *Sophia G.*, for life; remainder to the use of trustees to preserve &c.; remainders to the use of the first, second, and every other son of *J. G.* successively in tail male; and, on failure of such issue, in trust for testator's right heirs. Powers were given to *William*, and to *J. G.*, when in possession, to charge the estates with portions for younger children. There were further bequests to the testator's widow, and his said daughter *A. M.*

By a codicil, reciting that, since the date of the will, testator's son *William*

had died without issue, the testator altered his will as to certain lands not now in question, and charged the lands devised as above with further annuities to his wife and to *A. M.* By a second and third codicil he made his wife his executrix and residuary legatee, and gave a further legacy to *A. M.*

By a fourth codicil (made sixteen months after the date of the will) the testator recited that he thereby revoked "several of the dispositions" by him theretofore made, and instead thereof he devised all his estates to his daughter *A. M.*; and, from and after the determination of that estate, he devised the same to *J. G.* "and his heirs in strict entail, as in my said will directed," with the additional clause, that, if *J. G.* should not be thirty-one years old when the estates should devolve on him by the death of *A. M.*, he should not take possession till he attained that age, but the rents should accumulate and be in the hands of trustees for the benefit of *J. G.* "and his heirs;" "and in failure of issue of the said *J. G.*" the testator ordered that his estates should go over as was by the will directed. At the date of the codicil *J. G.* was eleven years old.

Held that, under the will and fourth codicil, *J. G.* took a life estate only. *Graves v. Hicks*, 38.

2. Testator by his will directed that his debts, &c. should be paid out of the rents and profits arising from his estate; after which he gave and bequeathed to *C. V.* the rents and profits of his estate, subject to *C. V.* keeping the whole of the premises in repair during his life: "Only after his death, I give and bequeath unto my three nieces" "all that freehold or leasehold premises now rented," &c., "situated," &c., "to and for their own use and purposes, equal, share and share alike." He then gave and bequeathed some other freehold and leasehold premises, and some plate, &c.: and he left the rest and remainder of his property, be it what it might, to *C. V.*

Held, that a niece took only a life estate under the will. *Doe dem. Viner v. Eve*, 317.

II. Devise of copyhold without admittance and surrender.

Devise, by an heir at law, of copyhold

hold descended to him, is good, though he never was admitted or surrendered, or paid the fine due to the lord on the descent of such copyhold.

Stat. 55 G. 3. c. 192., making devises of copyhold valid without surrender to the uses of the will, extended to wills made under the above circumstances. *Doe dem. Perry v. Wilson*, 321.

DISCHARGE OUT OF CUSTODY.

Application for, on bad affidavit of bail, when to be made. *Arrest*, III.

DISTRESS.

Warrant of, what it must state. *Justices*, II., 1.

EASEMENT.

I. Distinction between easement and profit à prendre.

The privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a profit à prendre, but a mere easement.

Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken.

Semble, that, supposing such a right to be a profit à prendre, a declaration stating the plaintiff to be entitled to it, by reason of his occupation of an ancient messuage with the appurtenances, "for the more convenient use and enjoyment of his said messuage and premises," would not be bad on general demurrer, for want of expressly limiting the claim to water taken by cattle levant and couchant, or to be used on the premises. *Manning v. Wadale*, 758.

II. How right of, to be set out on pleadings. *Antè*, I.

ECCLESIASTICAL COURT.

Prohibition to. See *Prohibition*.

EJECTMENT.

I. Right of entry within twenty years.

E., being in occupation of land, signed an instrument, whereby he recited that he was tenant of the land;

EJECTMENT, I, II.

that *L.* claimed the fee, and had entered in the name of taking possession; that *E.* did thereby attorn to *L.*, and become tenant to him from the preceding *Michaelmas* for such part as was in his occupation, at the rent under which *E.* now occupied, and that he had that day paid *L.* a shilling in part of his rent: Held, that this was an attornment, but not an agreement requiring a stamp, though no title was shewn aliunde in *L.*

Held also, that it was evidence of *L.*'s ownership at the time of the attornment, against future occupiers, though such occupiers did not claim through *E.*

The land was copyhold. After the attornment, *L.* was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with proper formalities in the copyhold court, within the twenty years following. Held that *L.* (before stat. 5 & 4 W. 4. c. 27.) was absolutely barred from bringing ejectment at the end of twenty years, though *E.* continued in occupation till within twenty years of the ejectment being brought. *Doe dem. Linsey v. Edwards*, 95.

II. Adverse possession within stat. 3 & 4 W. 4. c. 27. s. 15.

1. *D.* mortgaged land in fee to *J.*, subject to a proviso of cesser upon payment of the money secured upon a day more than twenty years before the passing of stat. 3 & 4 W. 4. c. 27. Within twenty years before the passing of the statute, *D.* acknowledged that the mortgage money was unpaid. On ejectment brought by the heir of *J.* within five years after the passing of the statute, the jury found that the mortgage money was unpaid. Held, that the ejectment was not barred by sect. 2., *D.*'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plaintiff having, by sect. 15., five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest. *Doe dem. Jones v. Williams*, 291.

2. *W.* being owner in fee of certain lands, *I.* occupied them for twenty years, and until his own death, which

was

was before *W.*'s death. After *I.*'s death, his widow, and afterwards the defendant, who was eldest son of *I.*, held on, till and after the death of *W.*, and until ejectment was brought by *W.*'s devisee, within five years of the passing of stat. 3 & 4 *W.* 4. c. 27. The jury found that the possession was not adverse to *W.*: Held, that the lessor of the plaintiff was not barred by sects. 2 and 7, but had five years from the passing of the statute, under sect. 15; and that the defendant could not resist the action on the ground that, having had no notice, he still continued tenant at will. *Doe dem. Burgess v. Thompson*, 533. (See remainder of placitum *Copyhold*, II.)

ELECTION.

Poll at election of parish officers, when demandable of right. *Parish*, I., 1.

ENTRY.

What constitutes entry and expulsion. *Landlord and Tenant*, V.

ERROR, WRIT OF.

I. When it lies.

On a feigned issue directed by the Court of King's Bench to try the existence of certain customs, the plaintiff had a verdict, subject to the opinion of the Court on a special case, the question being, whether the customs, as stated in the declaration, had been sufficiently proved at the trial. The Court having given judgment for the plaintiff, error was brought in the Exchequer Chamber, on the ground that the customs, as stated in the declaration, were not legal customs. The Court of Exchequer Chamber quashed the writ, on the ground that error did not lie on a feigned issue.

Quære, by the Court of K. B., whether the Exchequer Chamber had power to quash a writ of error returnable in the latter Court:

Held, in K. B., that, on sci. fa. to revive a judgment against an executor, it is not a good plea that a writ of error is depending on the judgment.

Agreed, in K. B., that there may be an immemorial custom in a manor to

surrender lands in trust. *Snook v. Matlock*, 239.

II. Whether it may be pleaded to scire facias to revive a judgment. *Ante*, I.

III. Power of Court of Error to quash writ. *Ante*, I.

ESTATE.

I. For life; what words create. *Devise*, I.

II. Settlement by. *Poor*, IV.

ESTOPPEL.

When party not allowed to deny execution of deed not produced. *Evidence*, VI., 2.

EVICTION.

What constitutes an entry and expulsion. *Landlord and Tenant*, V.

EVIDENCE.

I. Admissions.

Payment into Court, what it admits. *Pleading*, IV., 6., (1).

II. Attestation.

When proof by attesting witness dispensed with. *Post*, VI., 2.

III. Declarations.

Declarations subsequently made to explain intention of previous transaction.

In assumpsit by the assignee of an insolvent debtor, for money due to the insolvent debtor before his petitioning, defendant pleaded that the insolvent, before he petitioned, and more than three months before the commencement of his imprisonment, assigned his debts and effects to *W.*, in trust for creditors, and made *W.* his attorney; that *W.* demanded the debt of defendant; that defendant paid him; and that the insolvent did not execute the indenture with intent to petition. Replication, that the indenture was executed by the insolvent, being then in insolvent circumstances, voluntarily, and within three months before the commencement of his imprisonment, and with intent to petition. Rejoinder, traversing the intention only.

Held, that the plaintiff could not give in evidence, in support of this issue,

issue, the contents of the schedule delivered by the insolvent to the Insolvent Debtors' Court, more than four months after the execution of the indenture.

The verdict having been for plaintiff, and a new trial having been granted on account of the admission of such evidence, plaintiff gave fresh notice of trial, whereupon defendant withdrew his pleas, and suffered judgment by default; and a writ of inquiry was executed: Held, that plaintiff was not entitled to his costs of the first trial. *Peacock v. Harris*, 449.

IV. Estoppel.

When party not allowed to deny execution of deed not produced. *Post*, VI., 2.

V. Parol evidence to explain written documents.

Meaning of technical words in a covenant.

Lessees of a coal mine covenanted with the lessors that they would, by a certain time, get all the demised coal in the township of B. "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. In an action for breach of the covenant, a question arose whether "level" was used in the ordinary sense, of a horizontal plane, or in a peculiar sense, having reference to the drainage: Held, that evidence was admissible to shew the understanding of the term "level," used as in the above lease, among coal-miners.

It was referred to an arbitrator to receive evidence as to the meaning of the covenant, according to the *custom and understanding of miners*, and to state a case for the opinion of the Court. He found that the mine was situated within an extensive coal-mining district in the county of Lancaster; and that, "according to the custom and understanding of miners throughout that district," the terms "level," "deeper than," and "below," signified &c.; stating the construction of the terms, which was in favour of the defendant. It did not appear, as to some of the parties to the lease, that they resided within the district, and they were named, in the lease, as of other places.

Held, that the existence of the cus-

tom stated, in the district wherein the mine lay, did not raise a conclusion of law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion; and that the Court could not give judgment for the defendant.

Semble, that they might have done so, if the arbitrator had found the custom of miners without limitation as to a district. *Clayton v. Gregson*, 302.

VI. Secondary evidence of written documents.

1. What will let in. *Post*, 2.

2. What admitted.

(1). In an ejectment tried at *Liverpool*, notice to produce a deed of feoffment was given to the defendant on the commission day of the assizes, and the trial took place fourteen days after. The Judge at Nisi Prius having held this to be sufficient notice to let in secondary evidence, the Court refused to disturb the ruling.

(2). Held, that an abstract, which had been compared with the deed of feoffment, was good secondary evidence of the contents, no proof being given on either side of the existence of any copy of the deed. *Quære*, whether, if the existence of such a copy had been proved, the abstract would have been evidence?

(3). It appeared, by the abstract, that the deed of feoffment purported to be executed by the parties; and it was proved that one H. had, after the date of the feoffment, been in possession of the premises, and of the deed; that he had conveyed (in what way it did not appear) to defendant, and, at the time of the conveyance, had handed over the feoffment to the defendant, and that the feoffment was comprehended in the abstract of title then made, which was the abstract produced at the trial. The witness, who proved as above, stated also that there were attesting witnesses to the feoffment, and that a memorandum of livery of seisin was indorsed upon it, and witnessed. Held, that, as, against the defendant, there was proof of the due execution of the deed, and that it was unnecessary to call an attesting witness, or prove livery of seisin.

(4). In ejectment on the several demises

mises of *A.* and *B.*, proof having been offered in support of both *A.*'s and *B.*'s title, defendant tendered evidence after the close of plaintiff's case, which was admissible only as against *B.*'s title: Held, that the plaintiff might, at that stage, abandon the demise of *B.*, and that, on his doing so, the evidence was inadmissible as against *A.*'s title. *Doe dem. Rowlandson v. Wainwright*, 520.

VII. Writing to refresh memory.

Agreement invalid under Statute of Frauds. *Landlord and Tenant*, VI.

VIII. Handwriting.

Proof by comparison with other writing, how far allowed. *Handwriting*.

IX. Presumptions.

1. Of notice previous to binding parish apprentice, on appeal against order of removal. *Poor*, II., 1.

2. What may be presumed at variance with an immemorial custom.

In case, by the lord of a manor, for disturbance of a market, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor.

Plaintiff obtained a verdict, and a new trial was granted on account of the admission of improper evidence. Plaintiff drew up the rule for the new trial, and served it on defendant, who informed plaintiff that he would not avail himself of the rule.

The Court ordered that the postea should be delivered to plaintiff, and that he should have his costs of the trial.

But the Court allowed neither party the costs of the rule for a new trial, or of the rule for giving the postea and costs to the plaintiff. *De Rutzen v. Lloyd*, 456.

3. Division of parish by commissioners of inclosure, how far questionable on trial of appeal against poor rate. *Statute*, XIII.

X. Husband and wife.

Proof of non-access.

Neither husband nor wife can be

examined for the purpose of proving non-access during marriage.

Nor can either be examined as to any collateral fact, for the purpose of proving non-access. As, that the husband, at a particular time, lived at a distance from his wife, and cohabited with another woman. *Res v. Sourton*, 180.

XI. Certificate of apothecary, when necessary to be proved.

In an action brought since the rules of *Hil. 4 W. 4.* for medicines furnished, and work done, by plaintiff, as an apothecary, the plaintiff is liable to be non-suited under stat. 55 G. 3. c. 194. s. 21., if he fail to prove his certificate, or that he was in practice before August 5th, 1815, although the defendant has pleaded only non-assumpsit.

Or although the defendant has pleaded (in debt), as to part, that he never was indebted, and, as to the residue, a tender. *Shearwood v. Hay*, 383.

XII. Custom as to taking surrenders in a manor, how shewn. *Copyhold*, III.

XIII. What proof of negligence will make bailee liable. *Bailment*, I.

XIV. Evidence of right of pasture appurtenant to a messuage.

In replevin for sheep, the defendants made cognisance, as bailiffs of the tenant of a messuage and lands called *B.*, that the said tenant, and all those whose estate, &c., occupiers of *B.*, had the sole and exclusive right of pasture and feeding of sheep on *L.* the locus in quo, as to the said messuage, &c., appertaining; and that the plaintiff's sheep were damage-feasant. By another cognisance they alleged a right of common over *L.* as appurtenant to *B.* The pleas in bar denied the above rights, and alleged that the plaintiff had right of common over *L.*, as appurtenant to his messuage, &c., called *T.* Issues were joined as to the several rights.

At the trial it appeared that *L.* was a mountain sheep-walk, upon which no act of ownership had been exercised but the feeding of sheep. The defendants abandoned their alleged right of common; and upon the issue as to the exclusive pasturage, the jury (having had their attention called to the

the difference between a mere privilege and the right of soil) found a verdict for the defendants, and "that *L.* was part of the farm of *B.*;" finding also, as to the remaining issue, that the plaintiff had no right of common in respect of *T.*

On motion to enter a verdict for the plaintiff, or for a new trial, or judgment for the plaintiff non obstante verdicto on the issue as to the exclusive right of pasture, the Court held that, upon the evidence and finding, the cognisance could not be sustained; and they granted a new trial. *Jones v. Richard*, 413.

XV. How far Court will compel a party to furnish evidence against himself.

The Court will not order a town clerk, against whom a criminal information has been filed for misconduct in his office, relating to an election of councillors of the borough, to produce the election papers which are in his official custody, in order that they may be impounded, to be forthcoming at the trial as evidence against him; though it is suggested that the six months, during which the clerk is required to keep the papers (by stat. 5 & 6 G. 4. c. 76. s. 35.), will expire before the trial. *Rex v. Nicholls*, 376.

XVI. Evidence how applicable to the record.

1. How far party by abandoning an issue may shut out evidence admissible only as to that issue. *Antd*, VI. 2.
2. What satisfies allegation on pleadings of an entry and expulsion. *Landlord and Tenant*, V.
3. In particular actions.

(1.) Assumpsit.

Action by apothecary, when proof of certificate necessary. *Antd*, XI.

(2.) Concessit solvere.

What consideration must be shewn. *Inferior Court*.

(3.) Debt.

What may be given in evidence on payment into Court and plea of non-debitatus as to any further sum. *Pleading*, IV, 6, (1.).

EXECUTION.

Discharge of prisoner on petition of wife.

A person having been in prison twelve months in execution on a judgment

FRAUDS, STATUTE OF, I.

for a debt not exceeding 20*l.* exclusive of costs, was disordered in mind, and unable to transact business. His wife gave notice to the plaintiff that she should apply to the Court for his discharge under stat. 48 G. 3. c. 123.: and she applied accordingly.

Notices had been given by the plaintiff for the purpose of bringing up the defendant under the compulsory clause, 33 G. 2. c. 28. s. 16.: but no account had been obtained from him.

Held, that the Court might act upon the wife's application, and discharge the prisoner. *Clay v. Bowler*, 400.

EXONERETUR.

Neglect to enter exoneretur on bail-piece, its effect. *Bail*, III.

EXPULSION.

What constitutes entry and expulsion. *Landlord and Tenant*, V.

FILIATION.

Application for order, to what sessions to be made. *Bastardy*, I.

FORFEITURE.

For breach of covenant; what amounts to a waiver. *Landlord and Tenant*, II.

FRAUDS, STATUTE OF.

- I. How far written agreement may be waived by parol.

1. In assumpsit, the first count recited an agreement that plaintiff should grant, and defendant take, a lease of lands; and that all straw, &c. which should be on the lands when possession was given up to defendant, should be valued to plaintiff by persons named respectively by plaintiff and defendant, and the amount paid to plaintiff by defendant: that, on the execution of the lease, defendant should accept it, and execute a counterpart; and that either party, making default in performance, should forfeit 30*l.*: mutual promises to perform the agreement: that defendant entered under the agreement, and took possession of the straw, &c.; that afterwards defendant proposed

proposed that the straw, &c., should be valued to plaintiff by *D.* on the respective behalves of plaintiff and defendant; that plaintiff assented: that the straw, &c. was valued to plaintiff by *D.*; that plaintiff was ready to grant the lease according to the agreement, but defendant did not pay the amount of the valuation. Second count for goods bargained and sold, and taken by the defendant under such bargain and sale.

Plea to the first count, that the first agreement was in writing, signed by plaintiff and defendant; and the proposal and assent that *D.* should value, only verbal. To the second count, that the goods consisted of straw, &c., which were bargained and sold under a written agreement between plaintiff and defendant, according to which they were to be valued by persons chosen respectively by plaintiff and defendant; and that no such valuation had been made, but only a valuation by *D.*: that defendant was ready, and had proposed, that they should be valued as in the agreement; but plaintiff refused.

Replication, 1., to the plea to the first count, that, by the proposal and assent, and the valuation accordingly made, plaintiff and defendant respectively waived performance of so much of the agreement as related to the valuation and substituted the valuation by *D.*: 2., to the plea to the second count, that the straw, &c., was bargained and sold under the agreement in the first count mentioned; that afterwards defendant proposed, &c. (as in first count), and plaintiff assented, and *D.* valued accordingly; by means of which plaintiff and defendant waived, &c. (as in the replication to the plea to the first count).

Rejoinder, to replication 1., that the waiver and substitution were by word of mouth only. To replication 2, that the proposal and assent were by word of mouth only.

On general demurrer to the rejoinder: Held, that the original was an entire agreement relating to an interest in lands, and necessarily in writing; that, even if the parties could waive the whole verbally, they appeared by the record not to have done so; and that a part of it could not be ver-

bally waived, even supposing that part to have been, if standing by itself, an agreement not required to be in writing.

2. The plea commenced by a general allegation that plaintiff ought not to have or maintain his aforesaid action thereof against defendant; then followed matter expressly confined to "the first count," with a verification and prayer of judgment whether the plaintiff ought to have or maintain "his aforesaid action thereof." The record then went on thus: "And as to the second count," &c., with matter expressly confined to "the second count," and verification and prayer of judgment, as before:

Held, that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer to the rejoinder. *Harvey v. Grabham*, 61.

II. What tenancy created by entry of tenant after agreement void by Statute of Frauds. *Landlord and Tenant*, VI.

GENERAL ISSUE.

What amounts to, in assumpsit. *Pleading*, IV, 5 (1-).

GUARDIAN.

See *Infant*.

HABEAS CORPUS.

- I. How far Court will interfere by habeas corpus during proceedings in Court of Chancery. *Infant*, I.
- II. When Court will direct meeting of commissioners to discharge bankrupt from custody. *Bankrupt*, I.

HANDWRITING.

Proof of, by comparison with other writings.

1. On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause; but not else. *Doe dem. Perry v. Newton*, 514.

2. Defendant in ejectment produced a will,

a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shewn to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court.

Per Lord Denman C. J. and Williams J. Such evidence was receivable.

Per Patteson and Coleridge Js. It was not. *Doc dem. Mudd v. Suckermore*, 703.

HIGHWAY.

I. Indictment for non-repair. Requisites of plea by parishioners shewing liability in smaller district.

Indictment, alleging that a public highway within a parish is out of repair, and that the parish ought to repair it. Plea, that the highway lies in a township within the parish; that the inhabitants of the township have been accustomed, and ought, to repair all public highways within it *which otherwise would be repairable by the parish at large*; that the parishioners never have repaired the said highway; and that, by reason of the premises, the township ought to repair, and the parish ought not to be charged. Replication, traversing the custom for the township to repair all public highways within it which would otherwise &c. Verdict for defendants.

Judgment arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not shew what party other than the defendants was liable to repair.

Judgment for the Crown notwithstanding veredicto, refused. *Rex v. Eastington*, 765.

II. Order for stopping and diverting.

1. What it may state.

(1.) Under the Highway Act, 13 G. 3. c. 78. s. 19., the justices in special sessions could not, by one and the same order, direct that a highway should be diverted, and that the old way should be stopped. Nor was any alteration made in this respect by stat. 55 G. 3. c. 68. (See stat. 5 & 6 W. 4. c. 50. s. 1., and sects. 82. to 91.)

Under stat. 15 G. 2. c. 18. s. 5., a certiorari to remove an order for stopping a highway may be applied for within six calendar months after such order has been confirmed at sessions, though more than six calendar months have elapsed since the order was made. *Rex v. Justices of Middlesex*, 626.

(2.) An order of justices for stopping an unnecessary highway, under stat. 55 G. 3. c. 68. s. 2., is bad, if it stop up half the breadth of a highway, leaving the rest open; although the other half be not within their division.

Quære, whether the justices of the two divisions could, by orders made concurrently, stop both sides.

Justices cannot stop several highways by one order, except so far as they are authorised by stat. 5 & 6 W. 4. c. 50. s. 86.

Semble (by Lord Denman C. J. and Coleridge J.) that, if an order has been properly made and enrolled for stopping a highway, it is not necessary, to make such order completely effectual, that an actual stoppage should have taken place.

Held, by Lord Denman C. J. and Williams J., that, if an order for stopping a highway, under stat. 55 G. 3. c. 68., begins "We," &c. "having upon view found, and it appearing to us," that a certain highway, &c. is unnecessary, the recital does not imply that the justices acted upon any other information than their own view, and is well enough. *Rex v. Inhabitants of Milverton*, 841.

2. Where highway in different jurisdictions. *Antd*, II, 1. (2.)

3. Stopping several highways by one order. *Antd*, II, 1. (2.)

4. Whether actual stoppage necessary to make order effectual. *Antd*, II, 1. (2.) See further *Turnpike Road*.

HIRING.

HIRING.

Settlement by hiring and service. *Poor*, III.

HUSBAND.

See *Baron and Feme*.

IMPOUNDING.

For what purpose Court will impound papers in custody of official person. *Evidence*, XV.

IMPRISONMENT.

Under conviction.

1. Power of justices to award. *Conviction*, I.
2. From what time term of imprisonment to be computed. *Conviction*, I.

INCLOSURE.

From what time legal seisin in allotments takes effect under commissioners' award.

By a local inclosure act it was provided, that the several lands, &c., to be allotted and awarded in pursuance thereof, immediately after such allotments were made, should be, remain, and enure to the several persons to whom the same should be respectively allotted, who should from thenceforth stand and be seised and possessed thereof to the same uses, estates, trusts, and purposes, and subject to the same settlements, &c., charges and incumbrances, as the several and respective lands, &c., in lieu of which such allotments should be respectively made, were then held under, subject to &c., or might or would have been held under, &c., if this act had not been made.

The commissioners, in 1812, marked out an allotment, in lieu of lands belonging to *S.*, and put him in possession, but their award (in which they made the same allotment to *S.* in lieu of the same lands) was not executed till 1835. In the meantime (1818), *S.* mortgaged the allotment.

Held that, under the above enactment, *S.* had legal seisin of the allotment from the time of his being put into possession, and might mortgage before execution of the award. *Doe dem. Harris v. Saunder*, 664.

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INDENTURE.

Of apprenticeship: allowance by justices. *Poor*, II. 1.

INFANT.

I. Who entitled to custody of.

H., the father of two children, on his wife's death, requested her father and mother to come from *America*, where they were settled, to *England*, and there take charge of the children, which they did. About four years afterwards *H.* died, having made his will the day before, in which he left his property to trustees to be converted into money and divided between his two children when of age, the interest to be applied in the meantime, by the trustees, for their education, &c.; and he appointed the trustees guardians of the persons and estates of the children, and requested them to cause the children, to be properly educated. 3000*l.* bank annuities was vested in other trustees, for the benefit of the children, under the testator's marriage settlement. No real property passed to either child from the testator. The grandfather and grandmother, who, ever since their coming to *England*, had had the custody of the children, refused to deliver them up when demanded by the guardians. The Court, on habeas corpus, ordered them to do so.

While the habeas corpus was depending, the grandfather and grandmother filed a bill in Chancery on behalf of the children, against the guardians, for an account, and to have the children and their property put under the protection of that Court. The guardians put in their answer, about a month before the above decision.

Seemle, that, if it had been shewn to this Court that a speedy decision in Chancery was to be expected, they would have delayed enforcing the writ. *Rex v. Isley*, 441.

II. How far Court will interfere by Habeas Corpus for proper custody of. *Ante*, I.

INFERIOR COURT.

How cause of action must be shewn to be within jurisdiction.

In an action brought in an inferior court, in *Wales*, upon a concessit solvere, though the declaration (according to the usage of such court) state merely a promise and not a consideration, the plaintiff must prove a consideration arising within the jurisdiction.

It is not sufficient to prove that the defendant promised to pay within the jurisdiction, unless it appear that the promise was made upon an account stated, or other consideration arising, there. *Williams v. Gibbs*, 208.

INFORMATION, CRIMINAL.

I. Upon what affidavits granted.

D. obtained a rule nisi for a criminal information against the publishers of a libel, on his affidavit that the imputation in the libel was false. The Court discharged the rule, on the sole affidavit of *S.*, who deposed that the imputation was true. Afterwards *S.* made declarations, and depositions in an ecclesiastical suit (but not, apparently, material to such suit), contradicting his affidavit in all particulars. *D.* then indicted *S.* for perjury, and the bill was found, but *S.* left the country. In the term after *S.* had made the declarations and depositions, and after he had gone away, *D.* obtained another rule for a criminal information against the publishers, on affidavit of the above facts, and of his innocence as before. In answer, affidavit was made that *S.* gave the information, after the publication, voluntarily, and that the deponent then and now believed such information to be true; but no affidavit was made as to information or belief at the time of the publication.

The Court, under the peculiar circumstances, made the rule absolute. *Rex v. Eve*, 780.

II. Interference of Court to compel party to furnish evidence against himself
Evidence, XV.

INN OF COURT.

Whether compellable to admit a person a member. *Mandamus*, II, 1.

INSOLVENT, I.

INQUISITION.

Of jury for assessing compensation under local act. *Jury*, III, 1.

INSANE.

Discharge of insane prisoner, under stat. 48 G. 3. c. 123., on petition of wife. *Execution*.

INSOLVENT.

I. What assignment of a debt by insolvent good as against his official assignees.

M., owing 404*l.* to *T.*, became bankrupt. Defendant advanced 105*l.* to *T.*, who was then solvent, on a bonâ fide verbal agreement that he should be repaid out of the debt from *M.* to *T.*, and the dividends thereon; and *A.*, the solicitor to *M.*'s commission, was privy to the bargain; but it did not appear that *A.* acted for *M.*'s assignees in the transaction, or communicated it to them, or that they knew of it, till after *T.* was taken in execution on a judgment recovered against her in an action commenced more than three months after the time of the agreement. Within three months before the arrest, and before the verdict in the action but after its commencement, *T.* gave defendant a written order on *M.*'s assignees to pay the 105*l.* to defendant. After the verdict, but before the arrest, *T.* assigned in writing to the defendant the debt due to her from *M.*, and the dividends; and, on the same day, *T.*, for the first time, proved her debt against *M.*'s estate. The dividends amounted to 80*l.*, which defendant received from *M.*'s assignees. Afterwards *T.* was discharged by the Insolvent Court, and her assignee sued defendant for money had and received. Held,

(1.) That the transfer to defendant of the right to part of the debt due from *M.* to *T.* was not void, under stat. 7 G. 4. c. 57. s. 32., the bonâ fide verbal agreement being sufficient to pass it, and the assent of *M.*, or his assignees, not being necessary to give the defendant an equitable title.

(2.) That the legal property in such part of the debt was not in the plaintiff, the defendant being equitably entitled

to that specific part at the time of the imprisonment, although a contingent residue of the whole debt might ultimately come to the plaintiff.

(5.) That the whole debt was not in the disposition of the insolvent, under stat. 7 G. 4. c. 57. s. 30., the knowledge of *A.* being tantamount to the knowledge of *M.*'s assignees.

Judgment for defendant. *Tibbitts v. George*, 107.

II. Order and disposition of insolvent. *Anté*, I.

III. What constitutes a voluntary preference. *Anté*, I.

INSURANCE.

When Court will compel payment of money into Court on consolidation of insurance causes. *Payment into Court*, I.

JUDGE.

I. Certificate of, for costs, under stat. 43 *Elix.* c. 6. *Costs*, I. 3.

II. Summing up of, at trial, how shewn. *Practice*, XI. 3.

III. Form of motion to rescind order of Judge at chambers. *Arrest*, III.

JUDGMENT.

Entry of, after special finding by jury under stat. 3 & 4 *W.* 4. c. 42. s. 24. *Statute*, XXXI., 2. (1.); *Practice*, XI. 3.; *Verdict*, I.

JURY.

I. Verdict after special finding by jury. *Verdict*, I.

II. Power of Judge to discharge jury from giving verdict. *Custom*, III.

III. Inquisition of, for assessing compensation under local act.

1. What it must state.

The trustees of a turnpike road, under a local act, claiming to take certain premises on paying compensation to the parties interested, served a notice on a party, containing an offer of a sum as compensation for his undivided third part in a term in the premises, with a warning that, in default

of his acceptance, a jury would be summoned to assess compensation. They afterwards served him with a second notice, directed to him and several other parties interested in the premises, that, in pursuance of the local act and stat. 3 G. 4. c. 126., a jury would be sworn to assess the sums to be paid to the parties for their respective interests. Notices similar to the first were served on the other parties named in the second notice. The jury were summoned, and sworn to assess the sums to be paid to the parties for their respective estates, but found only the gross value of the premises; and the inquisition stated that the jury found that sum to be the value to be paid to the parties for their estates, "according to their respective proportions therein," without apportioning it. It appeared by affidavit that some of the parties were bare trustees.

(1.) Held, that the inquisition might be brought up by certiorari, being a proceeding under the local act and stat. 3 G. 4. c. 126. s. 85.; sect. 145. of that act, which takes away certiorari, being repealed by stat. 4 G. 4. c. 95. s. 86.; and stat. 4 G. 4. c. 95. s. 87. taking away certiorari in cases only of proceedings under stat. 4 G. 4. c. 95.

(2.) That the inquisition was bad for not apportioning the value among the parties interested.

(3.) That the objection to the inquisition might be taken before any order was made to pay the money; and the Court ordered it to be brought up by certiorari, though no order had been made.

(4.) The inquisition did not set out that the several parties had been served with notices to treat, but the fact appeared by affidavit. Semble, that for this defect also the inquisition was bad, as not shewing a foundation for the jurisdiction. *Rex v. Trustees of Norwich and Watton Road*, 563.

2. Whether removable by certiorari. *Anté*, 1.

JUSTICES.

I. Conviction by.

1. Power to imprison. *Conviction*, I.
2. Proceedings on appeal. *Conviction*, I.

II. Order of: what must be stated on it.

1. An order of justices upon a party, requiring him to pay money to a person claiming it as member of a friendly society (under stat. 49 G. 3. c. 125. s. 3.), must find in direct terms that the person applying is a member, that he is entitled to the money, and that the party against whom the application is made is, at the time, an officer of the society.

An order of justices served upon *D.* does not find him to be an officer, by being directed to "*D. steward of*" &c.

Nor by reciting a complaint upon oath which states him to be so.

An order does not shew the applicant to be a member, and entitled to the money, by reciting that he made complaint upon oath, in which complaint he stated himself to be a member, and the money to be due.

Though the order afterwards direct the money "so due and owing as aforesaid" to be paid.

A warrant of distress, founded upon and reciting such order, and omitting to find as above, is bad; and, if goods be taken under such warrant, the justices are liable in trespass. *Day v. King*, 359.

2. See *Highway*, II.

III. Jurisdiction of, as to binding parish apprentice. *Poor*, II. 1.

IV. Liability of, for proceedings on informal warrant. *Antd*, II. 1.

V. Mandamus to; to commit party to prison pursuant to conviction. *Conviction*, I.

See also *Sessions*.

LAND.

How far written agreement relating to interest in land may be waived by parol. *Frauds, Statute of*, I.

LANDLORD AND TENANT.

I. What constitutes an agreement for a tenacy. *Ejectment*, I.; *Post*, VI.

II. Stamp on attornment when necessary. *Ejectment*, I.

III. What amounts to waiver of forfeiture by landlord.

A lease of lands, &c., by *A.* to *B.*, contained a general covenant by *B.* to repair, and a further covenant that *A.* might give notice to *B.* of all defects and want of repair, and, if *B.* did not repair the said defects within two months, *A.* might enter and do the repairs himself, the expense of which *B.* was to repay at the time of paying his next rent, and, if he did not do so, *A.* might distrain on him for the expense, as in case of rent arrear. There was also a power to *A.* to re-enter upon breach of any covenant. The premises being out of repair, *A.* gave *B.* notice to repair within six months, and that, if *B.* did not repair within that time, he would perform the repairs and charge *B.* with the expense. The premises were not repaired within the six months. During that time, a negotiation was entered into by *A.* and *B.*; and, after the expiration of the six months, *A.* gave notice to *B.*, that, if he did not agree to certain terms in three days, *A.* would hold him to the covenants in his lease. *B.* did not agree.

Held, that *A.* could not recover in ejectment for a forfeiture, he having elected to perform the repairs and distrain on *B.* for the expense, and the general power to re-enter not being revived by the three days' notice.

Semble, that, where a power of re-entry for breach of covenant is reserved in a lease, and the reversion descends to coparceners at common law, one alone cannot maintain ejectment for breach of the covenant. *Doe dem. De Rutzen v. Lewis*, 277.

IV. How far one of two coparceners can take advantage of breach of covenant by tenant. *Antd*, III.

V. Breach of covenant in preventing tenant from entering under lease how to be alleged.

Where plaintiff declares on a covenant, in a lease by defendant, that plaintiff shall have, occupy, and enjoy the demised premises from a day named, for and during a certain term, and alleges as a breach that plaintiff on the day entered upon the demised premises, and became possessed of them for

for the term, but that he was not able to occupy and enjoy the said premises in this, viz. that, plaintiff being so possessed, defendant entered into the premises and upon plaintiff's possession, and expelled and kept him out; to which defendant pleads that he did not enter and expel, &c.; such breach is not proved by evidence that plaintiff came to take possession, but was refused entrance by defendant, who continued occupying the premises, and never admitted him.

And it makes no difference that by a clause in the lease (stated in the declaration) it was agreed that, at a time previous to the above-named day, plaintiff should be at liberty to enter the arable lands fit for wheat, for the purpose of sowing, paying at a certain rate for such lands as should be sown; and that plaintiff had entered on a part of said arable lands, and sown before the day fixed for his taking possession of the premises generally, such entry being alleged in the declaration according to the fact. *Hawkes v. Orton*, 567.

VI. Stipulations in an invalid agreement, whether binding on tenant after entry under it.

At a letting of lands, the terms of letting were read from a printed paper, and a party present agreed to take certain premises from *Lady-day* then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let and to take, subject to the printed terms, the name of the farm and the rent, and that the letting was for one year certain from *Lady-day*, and so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at *Lady-day*, and paid rent.

Held, (assuming the first transaction not to have been a demise), that there was a valid demise by parol under stat. 29 Car. 2. c. 3. s. 2. when the tenant entered; that a demise rendered valid by that section might contain the same special stipulations as a regular lease; and that, on the trial of an action by the landlord against the tenant for

breach of them, the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations. *Lord Bolton v. Tomlin*, 856.

VII. Notice to quit, how construed.

Land and buildings were held by a yearly tenant, the land from 2d February to 2d February, the buildings from 1st May to 1st May. The landlord, on 22d October 1833, served him with a notice to quit the land and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice."

Held that, as to the lands, the notice was to be considered a notice to quit on 2d February 1835; and that the landlord might recover both land and buildings after that day, in ejectment. *Doe dem. Williams v. Smith*, 350.

VIII. Landlord's right to double costs under stat. 11 G. 2. c. 19. s. 21. *Costs*, I. 1. (2).

LEVEL.

How meaning of word "level" in a covenant to be ascertained. *Evidence*, V.

LIBEL.

How privileged communication to be pleaded.

In an action for libel, it is not required by the rules of pleading, *Hil. 4 W. 4.*, that the defence of privileged communication should be specially pleaded. *Lillie v. Price*, 645.

LIEN.

Of town clerk on papers of corporation. *Attorney*, III.

LIMITATIONS.

Of actions, statute of. See *Statute*, XXX.

LONDON.

I. Custom of corporation of city, as to election of alderman. *Custom*, III.

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II. Lon-

II. London dock company: compensation under local act. *Statute*, XL.

LUNATIC.

Discharge of from execution on petition of wife. *Execution*.

MAGISTRATES.

See *Justices; Sessions*.

MANDAMUS.

I. When it lies.

1. To sessions to hear appeal. *Poor*, VII. 1.

2. To churchwardens to levy rate to pay interest of money borrowed.

Churchwardens, under stat. 59 G. 5. c. 134. s. 40., borrowed 1000*l.* from *M.*, upon the credit of the church rates, agreeing with *M.* that the sum should not be called in for twenty years, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by the rates, or otherwise; and that, in the meantime, *M.* should receive interest at 5 per cent. Some years after the agreement, and before the expiration of the twenty years, interest being in arrear, and no instalments of principal having been paid, nor any money raised to provide for liquidating the principal, this Court, on the application of *M.*, granted a mandamus, calling on the churchwardens to raise by rates a sum for the payment of the interest due, and to pay the same to *M.*; and also to raise by rate a sum equal to the amount of the yearly interest of the 1000*l.*, to be computed from the time of the borrowing, for providing a fund to pay the 1000*l.* But the Court refused to order any payment to be made to *M.* by way of instalment on the 1000*l.* *Rex v. St. Michael's, Pembroke*, 603.

3. To steward of manor to admit, where title disputed. *Copyhold*, I.

4. To commissioners of turnpike road to restore officer improperly removed *Statute*, XXIII. 1.

5. To churchwardens to proceed to election of a parish officer.

Quere, whether a quo warranto lies for the office of sexton?

Semble, per. Lord Denman C. J.,

that, if the right of electing a sexton be in the inhabitants of a parish, and a mandamus to hold a meeting for such election be grantable, the writ may be properly directed to the churchwardens, and not to the inhabitants in general.

Where a requisition had been directed to the churchwardens to call a meeting for such election, which they declined to do, on the ground that the minister had refused his consent, alleging the right of election to be in himself; semble, per Lord Denman C. J., on motion for a mandamus to hold such election, that the demand and refusal were sufficient to warrant an application for a mandamus to the minister and churchwardens.

A mandamus was moved for as above, on affidavits making a *prima facie* case of right in the inhabitants to elect, but affidavits were filed in answer stating facts to shew that the right was in the rector: Held, that a mandamus ought not to go, the evidence not being decisive in favour of the applicants, and there being another mode of trying the right, viz. by withholding the sexton's fees, or by submitting to the payment and bringing an action against him for the amount. *Rex v. Stoke Newington*, 584.

II. When it does not lie.

1. To inn of court to admit person a member.

Rule for a mandamus to the Principal and Antients of *Barnard's Inn* to admit an attorney into the society, discharged, it not appearing that this Court had the requisite authority over the Inn. *Rex v. Barnard's Inn*, 17.

2. To justices to commit party to prison pursuant to conviction. *Conviction*, I.

3. To Mayor of Corporation to restore name to Burgess list. *Corporation, Municipal*, I.

4. To officer of crown to deliver up goods rightfully obtained.

The Court will not grant a mandamus to compel the commissioners of customs to deliver up goods placed rightfully in their custody to secure the duty, on a suggestion that the full amount of the duty has been since tendered or paid.

Per Littleton J., a mandamus cannot be granted against a party acting merely

merely as officer of the crown. *Rex v. Commissioners of Customs*, 380.

5. To vestry to allow inspection of rate book kept under local act. *Poor*, I. 2.

6. Where a right is in dispute and there is another mode of trying it. *Ante*, I. 5.

7. To compel production of papers before trial in order to be stamped.

The Court will not grant a mandamus, calling upon parish officers, appellant against an order of removal, to produce pauper's indentures of apprenticeship (sworn to be in their custody), at the instance of the respondents, in order that an assignment thereon indorsed may be stamped, so as to be evidence on the hearing of the appeal. *Rex v. Westoe*, 786.

III. What constitutes a demand and refusal. *Ante*, I. 5.

IV. Return to, what it must state. *Statute*, XLI.

V. Costs of, under stat. 1 W. 4. c. 21. s. 6. *Statute*, XLI.

MANOR.

I. Custom to surrender lands in trust. *Error, Writ of*, I.

II. How far admittance to copyhold affected by imperfect title of Lord. *Copyhold*, II.

III. Mandamus to steward to admit. *Copyhold*, I.

MARKET.

Place of holding : what may be presumed as to grant. *Evidence*, IX. 2.

MORTGAGE.

Possession of mortgagee, how far adverse to that of mortgagor. *Ejectment*, II.

MUNICIPAL CORPORATION.

See *Corporation, Municipal*.

NEGLIGENCE.

What proof of negligence necessary to render bailee liable. *Bailment*, I.

NEW TRIAL.

See *Trial, New*.

NOT GUILTY.

When a good plea to action of debt on penal statute. *Pleading*, IV. 6. (2).

NOTES.

Of short-hand writer, for what purpose receivable by Court. *Practice*, XI. 3.

NOTICE.

I. In appeals.

1. Of grounds of removal of pauper, what sufficient. *Poor*, VII. 3. (1.)

2. Of grounds of appeal against order of removal. *Poor*, VII. 2.

3. Of appeal under local act, by whom to be given. *Poor*, VII. 1.

4. Of appeal against poor rate where parish divided into districts. *Statute*, XIII.

5. Of application for certiorari by parish, by whom to be given. *Certiorari*, I. 1.

II. Previous to binding parish apprentice : what will be presumed on appeal against order of removal. *Poor*, II. 1,

III. To quit, how construed. *Landlord and Tenant*, VII.

IV. To produce documents at trial, what sufficient time. *Evidence*, VI. 2.

V. By stage coach proprietors to limit their liability as to value of goods sent. *Bailment*, II.

VI. By commissioners of turnpike road of holding of meeting. *Statute*, XXIII. 1.

VII. Service of.

1. Notice by post letter, when sufficient. *Scire Facias*, I. 1.

2. Under stat. 41 G. 3. c. 109, what good. *Statute*, XIII.

OFFICE.

Settlement by serving office. *Poor*, VI.

ORDER.

I. Order and disposition of insolvent, what is within 7 G. 4. c. 57. s. 30. *Insolvent*, I.

II. Of justices.

What must be stated in it. *Justices*, II.; *Highway*, II.

OVERSEERS.

What they may include in their accounts.

Overseers' accounts being allowed, and an appeal against them dismissed, the allowance and order of sessions were brought up by certiorari, and an item appeared to be for the expenses of defending an appeal against overseers' accounts. This Court quashed the allowance and order, such an item being bad on the face of it, inasmuch as no supposable facts could justify it. *Rex v. Johnson*, 340.

PADDINGTON.

Parish of. Election of churchwardens. *Parish*, I. 1.

PARCENER.

I. Effect of partition.

One of two parceners aliened. The alienee and the other parcener agreed to make partition, and, an apportionment having been made, they and each of them, for the perfecting of such partition, conveyed to *H.*, in fee, one portion of the premises, habendum, to the sole use of the alienee in fee, in full of his moiety, and the other portion in like manner to the sole use of the second parcener, in full of his moiety.

Held, that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs ex parte materna. *Doe dem. Crosthwaite v. Dixon*, 834.

II. Remedy by one of two co-parceners for breach of covenant. *Landlord and Tenant*, III.

PARISH.

I. Election of parish officers.

1. The right to demand a poll is by law incident to the election of a parish officer by a shew of hands.

At the election of a churchwarden of the parish of *Paddington*, in *Midlesex* (subsequently to stat. 58 G. 3. c. 79.), the shew of hands was in favour

of *M.* A poll was demanded by a rate-payer present, who required that it should be taken according to stat. 58 G. 3. c. 69. s. 3. (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which *H.* and *G.* had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, and did not vote. By stat. 58 G. 3. c. 69. s. 8. nothing in that act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By stat. 5 G. 4. c. cxxvi. the vestrymen of the parish of *P.* are to be elected by ballot, by plurality of votes, as under stat. 58 G. 3. c. 69. s. 3.; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; and overseers are to be nominated by the vestry as may be done by parishioners in vestry in other cases. Before either act passed, and ever since, churchwardens were elected in *P.* by shew of hands, no poll ever having been demanded.

(1.) Held, that (assuming stat. 58 G. 3. c. 69. s. 3. to be inapplicable to the parish of *P.*) *G.* and *H.* were duly elected, the irregularity in the form of demanding the poll (if any) having been waived by the poll being in fact taken without objection from either party to *there being a poll*; and *H.* and *G.* having a majority on the poll according to either way of reckoning the votes.

(2.) Also, that stat. 58 G. 3. c. 69. s. 3. was applicable to *P.*; for that the fact of no poll ever having been demanded did not shew that the usage de facto in *P.* excluded a poll, and the elections were, at the time of passing stat. 5 G. 4. c. cxxvi., subject to stat. 58 G. 3. c. 69. s. 3. in the event of a poll being demanded.

(3.) A poll may be demanded at an election of parish officers, after the chairman has declared the result of a shew of hands. *Campbell v. Masand*, 865.

2. See *Mandamus*, I. 5.

II. Ap-

- II. Application by parish for certiorari.
Notice and recognisances under stat.
13 G. 2. c. 18. s. 5. *Certiorari*, I. 1.

PARSON.

- Liability of corn rent to poor rate.
Poor, I. 1. (2.)

PARTITION.

- Effect of partition by parcener. *Parcener*, I.

PASTURE.

- Right of, as appurtenant to a messuage,
how proved. *Evidence*, XIV.

PAYMENT INTO COURT.

- I. When Court will compel, pending
rule for new trial.

Sixty-five actions being brought by one party, on policies of insurance, against individual underwriters and incorporated companies, for sums amounting in the whole to 27,200*l.*, the defendants obtained a consolidation rule, which by its terms made the plaintiff as well as the defendants. One cause was tried, the plaintiff had a verdict, and a rule nisi was granted for a new trial, on affidavit of surprise and of merits. From the state of the new trial paper, it was expected that cause could not be shewn for a very long time; two of the defendants had lately died; and the plaintiff alleged that, while the cause stood over, he lost the interest of the 27,200*l.*

The Court would not, on these grounds, direct the amount insured to be paid into court, or invested, to wait the event of the cause in which a rule nisi had been granted. *Ohrly v. Dunbar*, 824.

- II. What it admits. *Pleading*, IV. 6. 1.

PLEADING.

- I. Form of action.

1. Liability of justices for proceedings on informal warrant. *Justices*, II. 1.

2. Assumpsit.

(1.) Recovery of money supplied to wife to enable her to proceed against husband.

Where a wife, ill-treated by her husband, indicts him for assaulting and

imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessities.

Otherwise, *semble*, if she exhibit articles of the peace against her husband. *Grindell v. Godmond*, 755.

(2.) Money had and received, who may maintain.

A debtor of plaintiff transmitted a sum of money to defendant, who admitted having received it, and, being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it. These statements were communicated to plaintiff, by defendant's authority.

Held that, on his failing to pay, plaintiff might sue him for money had and received, and that defendant could not allege a want of consideration moving from plaintiff to himself. *Lilly v. Hays*, 548.

3. Concessit solvere.

What consideration will support action. *Inferior Court*.

4. Ejectment.

What constitutes right of entry within twenty years. *Ejectment*, I.

- II. Parties to action.

1. When clerk to a public board may be sued in case for their neglect.

By the *Harwich* paving act, the commissioners "may sue or be sued for or concerning any thing which shall be *done by virtue or in pursuance of this act*, in the name of their clerk;" and are empowered to raise money by rates. Any person may advance money to them, *for the purposes of the act*, in purchase of annuities, which shall be payable and paid by the commissioners out of the money arising from the rates. The act prescribes the form of the grant; which purports that, by virtue of the act, five of the commissioners, in consideration of the sum advanced to them by the party, grant to him an annuity out of the rates to arise by virtue of the act.

A declaration, in case, against the clerk, stated that the plaintiff advanced a sum to the commissioners for the purchase of an annuity; whereupon, by a grant made according to the form of the statute, five commissioners, by virtue

virtue of the act, in consideration of the advance, granted to the plaintiff an annuity out of the rates; that a quarterly payment of the annuity became due; that the commissioners then held in their hands, out of the rates, money more than enough to satisfy it; whereupon it became their duty to pay it; and that they had not paid it. It did not appear by the pleadings that there were any annuitants besides plaintiff.

Held, that case was maintainable against the clerk, for this breach of duty by the commissioners.

Although the act provided (in a distinct section from that giving the power to sue as above mentioned) that no suit should be commenced "for any thing done in pursuance" of the act till certain notice was given, or after six months "next after the fact committed."

Held, also, that, on general demurrer, the declaration was not bad for want of an averment that the money was advanced for the purposes of the act.

Nor for omitting to aver that the commissioners had received money enough to satisfy all annuitants.

Defendant pleaded that it was not the duty of the commissioners to pay, &c. Held bad, on special demurrer, as a traverse of an inference at law. *Cane v. Chapman*, 647.

2. When consignor may sue common carrier for loss of goods. *Bailment*, I.

3. Whether record may be amended by introducing other parties. *Practice* XI. 1.

III. Declaration.

1. What averments must be made by party suing under local act to bring cause of action within the act. *Ante*, II. 1.

2. Profit à prendre: how far limitation of right to be shewn on pleadings. *Easement*, I.

3. Indebitatus assumpsit.
How defendant's promise to be alleged. *Post*, IV. 5. (3.)

4. Assumpsit for apothecary's bill.
Proof of certificate, whether necessary. *Evidence*, XI.

5. Bill of exchange.
Relative situation of indorser and indorsee. *Bills of Exchange and Promissory Notes*.

6. Covenant.

What shews breach of covenant.
Post, VIII.

IV. Plea.

1. Informal for not answering all it professes to answer.

A plea commenced by a general allegation that the plaintiff ought not to have or maintain his aforesaid action thereagainst defendant; then followed matter expressly confined to "the first count," with a verification and prayer of judgment whether the plaintiff ought to have or maintain "his aforesaid action thereof." The record then went on thus: "And as to the second count," &c., with matter expressly confined to "the second count," and verification and prayer of judgment, as before:

Held, that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer to the rejoinder. *Harvey v. Grabham*, 63. (See whole placitum, *Frauds, Statute of*, l.)

2. When bad for duplicity. *Post*, IV. 6. (2.)

3. Conclusion to country.

Trespass for breaking closes of and belonging to plaintiff, encumbering them with stones, &c., and thereby depriving plaintiff of the full use and enjoyment of the closes; also for pulling down rails, &c., thereon. Pleas, 1. Not Guilty. 2. Justification, alleging freehold in defendant: verification. 3. Denying that plaintiff, at the times when &c., was possessed of the said closes, rails, &c., in manner and form &c.: concluding to the country. 4. Justification, alleging that defendant, at the times when &c., was lawfully possessed of the closes, and traversing that the closes were, at the times when &c., the closes of plaintiff in manner and form &c.: conclusion to the country:

Held, on special demurrer, that the third plea was properly concluded to the country. *Fleming v. Cooper*, 321.

4. Pleading several pleas.

The Court will not, under the new rules, permit the following pleas to be pleaded together, to a declaration in trespass:—1. A custom for all tanners in the stannaries to make trenches in any lands for conveying water to any stannary

stannary worked by them, for the better working of the same. 2. The like, alleging the custom to be on making reasonable compensation. *Bastard v. Smith*, 827.

5. Assumpsit.

(1.) What amounts to the general issue.

Indebitatus assumpsit for work and labour, with promise to pay on request. Pleas, that the work was done in endeavouring to prevent a chimney from smoking, and on the terms that plaintiff should not be paid unless he prevented it from smoking, and that he had not prevented it. On special demurrer, held bad, as amounting to the general issue. *Hayselden v. Staff*, 155.

(2.) What may be given in evidence on plea of non-assumpsit. *Bailment*, II.

(3.) How a tender to be pleaded.

To indebitatus assumpsit for 20*l.* defendant pleaded, 1. Non assumpsit, except as to the sums of 3*l.* and 1*l.* 2. As to the said 3*l.*, parcel of the sum mentioned in the declaration, that, after the promise therein mentioned as to the 3*l.*, and before action brought, viz. on &c., defendant tendered the 3*l.* parcel &c., to plaintiff, &c. (in the usual form). 3. As to the 1*l.*, other parcel &c., that, heretofore and after the said promise as to the 1*l.*, and before action brought, viz. on &c., defendant paid plaintiff the 1*l.*, parcel &c. On demurrer to the second plea, assigning for cause that the tender appeared to be only of part of the admitted debt, and that the residue was not shewn to have been previously paid: Held, that the tender was well pleaded.

Per Lord Denman C.J., a declaration stating that defendant was indebted to plaintiff in 20*l.* for goods sold, and in consideration thereof *promised* (not adding "*the said plaintiff*;") to pay plaintiff the said 20*l.* on request, is good, independently of the rule, *Trin. 1 W. 4. Schedule. tit. Common Counts. Jones v. Owen*, 222.

6. Debt.

(1.) What non indebitatus puts in issue.

Plaintiff declared in debt for work and labour performed as an attorney for defendant, on his retainer, and for fees due and of right payable in respect thereof; defendant paid a sum into Court, and pleaded non indebitatus as

to the residue. Held, that defendant might prove that the plaintiff agreed to do the work (on a certain event, which had occurred) for costs out of pocket, which should not exceed a sum named. *Jones v. Reade*, 529.

(2.) What may be pleaded to debt on a penal statute.

To a declaration in debt on stat. 22 G. 2. c. 46. s. 14., charging the defendant that he, being deputy clerk of the peace, practised at the sessions as an attorney, a plea (since the new rules) that defendant was not at any of the times &c. deputy clerk of the peace, nor did he commit any of the supposed offences in manner and form &c., is bad for duplicity.

Semble, that a plea of Not Guilty would be good. *Faulkner v. Chevell*, 215.

7. Case.

How privileged communication to be pleaded to action for libel. *Libel*.

8. Replevin.

How a tender to be pleaded. *Replevin*, I.

9. Scire facias.

When bail allowed to plead after Judgment. *Scire Facias*. I. 1.

V. Replication.

1. De injuriâ, when to be replied.

In an action by the payee of a promissory note against the maker, defendant pleaded that the note was made and delivered to plaintiff in consideration of money and goods then agreed to be thereafter lent and supplied by plaintiff to defendant, but that plaintiff had not lent or supplied, &c. Replication, "that the defendant broke his promise without the cause in his plea in that behalf alleged:" Held good, on special demurrer. *Watson v. Wilks*, 237.

2. General traverse, without de injuriâ, what put in issue.

In assumpsit on a bill of exchange against the acceptor, defendant pleaded that, after the accepting and after the time for payment, he, being resident in *Scotland*, and subject to the laws thereof, in consideration that certain supposed creditors should forbear to molest or sue him, made his deed or writing, duly stamped and attested according to the law of *Scotland*, by which he conveyed to *J. D.*, and such

such persons as might thereafter be appointed trustees by the creditors, for the use of the creditors mentioned in the deed, and of other creditors whom the trustees should assume into the benefit of the disposition, all his moveable estate in *Scotland*, in lieu and full satisfaction and discharge of all his debts owing to the said creditors; that notice of the execution of the deed was given to divers supposed creditors in *Scotland* and *England*, including the plaintiff; that plaintiff, by writing signed by him, and valid by the law of *Scotland*, appointed *H. R.* his attorney, to concur in and adopt the deed, and receive the dividends; that *H. R.* did adopt the deed and its provisions on plaintiff's behalf, acted therein as plaintiff's authorised agent, took part in the management of the estate, &c.; that other creditors, in consideration of the said assignment, and the acceptance thereof by plaintiff, agreed to accept, and did accept, the same, in full satisfaction of their debts; that funds of defendant had since become available under the deed for the benefit of the creditors, sufficient to pay the debts of defendant, including that to plaintiff; and that all the proceedings were pursuant to the laws of *Scotland*; whereby, and by reason of the premises, and by the aforesaid laws, defendant had become absolutely discharged from the causes of action stated in the declaration.

Replication, that the defendant had not become nor was discharged in respect &c., in manner and form &c., on which issue was joined.

Held that, assuming that the allegations in the plea respecting the law of *Scotland* could be rejected (and semble, that they could not), and the plea be construed as setting up a defence according to the law of *England*, such a defence was not shewn on the plea; that the pleadings, therefore, must be understood to put in issue the law of *Scotland*; and that the defendant, to succeed on the plea, was bound to prove such law as a fact. *Woodham v. Edwards*, 771.

VI. Legal effect not to be stated on pleadings without facts leading to the inference.

Declaration in case stated that a suit in Chancery, by *J.* against *F.* and the present plaintiff, being pending, it was

ordered by the Court of Chancery that *J.* should pay money into Court, to the credit of the cause, subject to the further order of the court: that *J.* having contemptuously neglected so to do, to plaintiff's damage, plaintiff caused a writ of attachment to be sued out of Chancery against *J.*, directed to defendant, being sheriff of *N.*, which writ was delivered to defendant to be executed; whereupon it became defendant's duty to execute it in a careful and proper manner: yet defendant wrongfully, carelessly, and improperly, and against plaintiff's consent, attached *J.* by his body, *J.* being then privileged from being so attached, and defendant well knowing the premises; that *J.* was discharged by the Court of Chancery from the attachment; and, by means of the premises, plaintiff was deprived of the benefit of the writ, and delayed and hindered in compelling *J.* to pay, and was put to expenses and trouble in causing another writ to be issued, and was also put to costs in opposing *J.*'s discharge, and was otherwise damaged:

Held bad, for not setting out the nature of *J.*'s privilege, and that the objection might be taken on demurrer to the declaration, though not assigned for cause.

Semble, also, that the declaration disclosed no cause of action. *Lloyd v. Wood*, 228.

VII. What amounts to a traverse of an influence of law. *Ante*, II. 1.

VIII. What shows breach of covenant.

An indenture recited that *F.* and *G.* were entitled to a fourth part of a colliery for a term of years; that *G.* was also entitled, by agreement with *A.*, to a lease of land essential for working the colliery, and held the agreement in trust for himself and *F.* jointly; that *P.* had a power of sale upon a moiety of the colliery, for the same term, to secure an annuity, which power he was about to exercise; that *F.* and *G.* agreed to purchase the moiety, which was to be discharged from the annuity, and to grant a fresh annuity to *P.*, payable out of the profits accruing from the working the coal, by virtue of the term in the three parts of the colliery, and the agreement. By the same indenture, after such recital, the moiety was assigned and the annuity granted;

granted; and *F.* and *G.* covenanted severally for themselves, their executors, administrators, and assigns, to pay the annuity, as above, from the profits accruing, after payment of all rates, taxes, &c., and of the rents reserved on the term, or by the agreement; a right of entry on the premises charged, and of mortgage and sale, was given to *P.* on the annuity being in arrear; and *F.* and *G.* covenanted severally for themselves, their heirs, executors, and administrators (not naming assigns), to do nothing whereby the annuity might cease, determine, be impeached, or become void and of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease.

P. sued in covenant on the indenture, assigning for breaches, (1), that *F.* and *G.* took a lease of the land to which *G.* was entitled under the agreement, in their own names, and not in trust for *P.*, but for other persons, and forfeited and surrendered the agreement, whereby the annuity was impeached, and the plaintiff's right over the land and in the profits which would have accrued, ceased; (2), that under the land subject to the agreement there were veins of coal, the property of *A.*, and that *F.* and *G.* took the land at a higher rent, and otherwise on worse terms, than *G.* was entitled to by the agreement, in order to obtain the last-mentioned coal on better terms than they otherwise could have done, whereby &c. (as before); (5), that *F.* and *G.* afterwards assigned the land, amongst other things, to *H.*, whereby &c. (as before). On general demurrer to the declaration,

Held, by the Court of Exchequer Chamber, in accordance with the judgment of the Court of K. B., that the want of an averment that profits had, or would have, actually accrued from working the colliery was no objection to the declaration:

But that the first two breaches shewed no cause of action; for that, (1), the variation between the lease and the agreement did not invalidate the security; and, (2), the security was not shewn to be affected, since the profits of the colliery on which the annuity was secured were those remaining after

payment of such rent only as was reserved by the agreement.

But held, reversing the judgment in *K. B.*, (3), that the third breach shewed that the annuity was impeached; since the land in *H.*'s hands would not be subject to the powers of entry, mortgage, and sale; *H.*'s interest not being that which the covenantors had under the agreement, and he appearing to come in as a purchaser, not privy to the covenant, and not estopped by it. *Pitt v. Williams*, 885.

IX. Judgment.

Entry of, after special finding by jury. *Statute*, XXXI. 2. (1.); *Practice*, XI. 3. *Verdict*, I.

X. Variance between pleading and evidence.

Breach of covenant in preventing lessee from entering under lease. *Landlord and Tenant*, V.

XI. Criminal.

Indictment for non repair of road. Plea by parish showing liability of another district. *Highway*, I.

POLL.

At election of parish officers. *Parish*, I. 1.

POOR.

I. Rate.

1. Liability to rate.

(1.) What a beneficial occupation.

Governors of the poor, hiring a house without their district for the purpose of setting their own paupers to work there, and using it for that purpose only, are rateable in the parish in which the house is, as occupiers, whether the employment of the paupers there be profitable or not. *Governors of the Bristol Poor v. Wait*, 1.

(2.) Parson's corn rent in lieu of tithes.

By an inclosure act, certain allotments were made to the parson, as a compensation for the uninclosed glebe lands of his rectory, and for all rights of common belonging to the rectory; and it was enacted, that the commissioner for inclosure should ascertain the yearly value of all the tithes on the lands to be inclosed, and the ancient inclosed lands, and that the tithes should

should be deemed equal in value severally to one fifth, one seventh, and one eighth of the annual net value of different classes of lands respectively, and a corn rent be assigned to the parson, equivalent to the annual value of the tithes:

Held, that the parson was rateable to the poor in respect of such corn rent. *Rex v. Wistow*, 250.

(3.) Turnpike tolls under local act.

Trustees were appointed under a local act for making a road, and they and their successors were empowered to purchase lands, which should be conveyed to and vest in them, and to lay such lands into the intended road, to take tolls thereon, and to apply the receipts towards paying the interest of a sum advanced by certain shareholders, and to the putting the act in execution, and to the repayment of the principal advanced. By a subsequent act their powers were continued; and it was enacted that no person should be eligible as a trustee unless possessed of five shares in the capital stock raised for making the road, and a penalty of 100*l.* was imposed on any person acting without such qualification. The surplus of the tolls (after making certain other payments) was to be applied in paying the shareholders' interest, and, ultimately, their principal; and the act was to expire when the principal and interest were paid off, or, if they were not sooner discharged, in thirty-one years.

Stat. 5 *G. 4. c. 126.* (the provisions of which, except where expressly altered or repealed, extend, by sect. 4, to all turnpike acts made or to be made) enacts, by sect. 65, that no person, acting as trustee of a turnpike road, shall receive any money to his use or benefit out of the tolls, under a penalty of 100*l.* Sect. 51 enacts, that no tolls to be taken by the trustees of any turnpike road, nor any person in respect thereof, shall be rated to the poor.

Held that, although the trustees of the above road were shareholders and owners of the soil as before stated, and notwithstanding the contradiction between the above clauses in the general and local acts (with other alleged inconsistencies), the road was turnpike

within the provisions of the general act, and the trustees not liable, in respect of it, to a rate for "land upon which they had made a road, and in respect of which they received tolls." *Rex v. Trustees of Great Dover Street Road*, 492.

2. Right of rate payers to inspect rate books.

By stat. 35 *G. 3. c. 73.*, for the government of the parish of *St. Mary-le-Bone*, it was directed that the vestrymen should annually make a poor rate and other assessments, and that the rates to be so made should be entered in a book or books, which should state the names of the persons to be charged, the amount of assessment upon each person for each of such rates, and the arrears outstanding at the end of each year. The entry of the rate, made as above, was the original rate. The act said nothing as to inspection by the rate payers. Such books were accordingly kept, and also books, under Sir *John Hobhouse's Act* (1 & 2 *W. 4. c. 60. s. 32.*, containing accounts of all sums of money received and disbursed for parochial purposes, and of the articles, matters, and things for which the sums were received and disbursed; which latter books were open to inspection, and liberty given to take copies, according to the last-mentioned act; but these books did not contain the particulars stated in the book kept under the local act.

A rate payer demanded liberty to inspect and take copies of the first mentioned books (not offering any payment); which liberty being refused, he obtained a rule nisi for a mandamus:

Held, that the Court was not authorised by the above statutes, or stat. 17 *G. 2. c. 3.*, or at common law, to compel the granting of such liberty: And, therefore, rule discharged. *Rex v. St. Mary-le-Bone*, 268.

II. Settlement by apprenticeship.

1. By what justices indenture binding parish apprentice to be allowed.

Under stat. 56 *G. 3. c. 139. s. 2.* and stat. 3 & 4 *W. 4. c. 63. s. 1.*, where a district has justices of its own, not exercising jurisdiction in the rest of the county, and the county justices have a concurrent jurisdiction with them within the district, an indenture, binding

binding a parish apprentice by the officers of the district, to serve in the county, without the district, may be allowed, and the order made, by two of the county justices.

On an appeal respecting a settlement under such indenture, if the indenture and allowance do not mention that notice to the officers of the parish where the apprenticeship is to be served was proved or admitted before the justices at the time of allowing and executing the indenture, and no evidence be given either to prove or disprove the fact, the presumption is, that such notice was proved or admitted. *Rex v. Witney*, 191.

2. Service with second master with assent of first.

Settlement by apprenticeship cannot be gained by service under a second master, with the assent of the first, unless such assent be given to the particular service.

Quære, whether such assent can relate back to a service previously performed. But,

Held that, where a parish apprentice had served without such assent, until *October 1. 1816*, (after which, by stat. *56 G. 3. c. 139. s. 9.*, no parish apprentice could gain a settlement by service under a transfer made without consent of justices,) a ratification by the master after that day, without consent of justices, could not render the prior service valid for the purpose of settlement. *Rex v. Maidstone*, 326.

3. What will be presumed on trial of appeal as to notice previous to binding parish apprentice. *Antè*, 1.

III. Settlement by hiring and service.

1. Terms of agreement.

On a case sent from sessions, it was stated: That, on appeal against an order of removal, it appeared that the pauper was bound apprentice to a wheelwright, and served in the appellant parish under the indentures for twenty months; after which the pauper's father bought up the remainder of the time, and the indentures were cancelled, and the pauper afterwards let himself to another wheelwright, under a written agreement signed by the master, the pauper, and his father, — which was set out in the case, and by

which the father, on behalf of the pauper, agreed that the pauper should serve his master in his business of a wheelwright, from *3d December 1827*, to *3d March 1830*, the master paying, at the expiration of the term, *5l.* to the pauper, and in the meantime finding him meat, drink, and lodging; the father finding him clothes, washing, and all other necessities: — that the pauper stated that he served as an apprentice; that the respondents offered evidence of conversations between the parties, before and at the time of signing the instrument, and also of an indorsement thereon, which, however, was not proved to have been on the paper when the instrument was signed; that the sessions rejected the evidence in both instances, and confirmed the order; and that the order of sessions was to be quashed, or confirmed, according as this Court should, or should not, be of opinion that the agreement was one of hiring and service: Held,

(1.) That this Court was not concluded by the confirmation of the order at sessions.

(2.) That the agreement was one of hiring and service, and that the service must be understood to have been performed under the agreement.

(3.) That, as evidence, coming under the description of that which was stated to have been tendered, would in some cases be admissible, and in others not, it did not appear that the rejection was necessarily wrong.

This Court quashed the order. *Rex v. Billingham*, 676.

2. What an exceptive hiring.

Pauper was hired by the proprietors of a colliery, from *5th April 1816* to *5th April 1817*, to work as should be necessary for carrying on the colliery, and as he should be required to do by the owners, on the terms that the forfeitures, to be paid by him for such days as he should lay himself idle, should be paid to him to the same amount by the proprietors for every day he should be laid idle by them, except on the pay *Saturdays*, when the pit was going single shift; but, when the pit was going double shift, the men were to work one shift on the pay *Saturdays*, to make each shift work eleven days; that he should, except when prevented by sickness, &c.,

do a full day's work on every working day, except a single shift pit on the pay *Saturdays*; and, in default thereof, forfeit for every default 2s. 6d.; that he should be paid his wages every fourteen days; and that nothing in the agreement should prejudice the legal remedies belonging to masters and servants, or the jurisdiction of the magistrates. The following facts also were stated in a case sent from sessions.—Pay *Saturday* is every alternate *Saturday*. The ordinary day's work of a pit is twelve hours; the pit is then said to go single shift. When it is worked all the twenty-four hours, it is said to go double shift; in the latter case, workmen work ten and twelve shifts (of twelve hours each) in alternate fortnights respectively; the proviso as to working one shift on pay *Saturday* applies only to men working twelve shifts in the fortnight. Sometimes, when a pit is working double shift, a necessary job requires a few individuals (but rarely, if ever, the whole pit's crew) to remain in the pit, after the shift to which they belong has finished work. The pauper worked sometimes single shift, and sometimes double shift:

Held an exceptive hiring. *Rex v. Cowpen*, 333.

IV. Settlement by estate.

What equitable estate will confer a settlement.

A mortgagor in possession gave by will all his real and personal property to trustees, in trust to sell and apply the proceeds to pay his mortgage and other debts, and funeral expenses, and the residue to his wife for her own use. He also made the trustees his executors, and left some personal property. After his death, the wife resided in the parish where the land was situated, but not on the land; and the trustees resided on the land, and did not sell or render an account:

Held, that the wife gained a settlement by such residence; although it appeared that the trustees would have been glad to sell the land for the principal and interest due; and although, for the purpose of defeating the settlement, evidence was offered that the real and personal estate was not solvent, which the sessions refused to receive. *Rex v. Aslackby*, 200.

V. Settlement by renting tenement.

What constitutes a separate and distinct dwelling-house.

W. rented and occupied the middle floor of a house. Two outer doors, and some steps, which gave access to that floor, were appropriated to him exclusively. A separate flight of steps on the outside of the house led, by a different outer door, to a passage on the middle floor, from which passage a tenant occupying the upper floor reached his premises, by a staircase of his own. One of *W.*'s rooms opened into this passage, and *W.* could not reach that room but by going up the last-mentioned steps, and along the passage, or by crossing the passage from his other rooms, by a door in one of them, which was usually locked. All the last-mentioned rooms communicated with each other, and with both the doors appropriated to *W.*:

Held, that the premises occupied by *W.* were "a separate and distinct dwelling-house," within stat. 6 G. 4. c. 57, by renting which a settlement might be gained. *Rex v. Great and Little Usworth and North Biddick*, 261.

VI. Settlement by serving an office.

Nature of office.

Pauper, upon a vacancy of the offices of parish clerk and sexton of *B.*, was requested by the rector to perform the duty of clerk for a *Sunday*, which he did; and the rector afterwards said to him, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." Pauper accordingly entered upon the office. Soon afterwards, two parishioners objected to what the rector had done, who answered that he should persist. The parish were in the habit of paying a salary to the parish clerk and sexton; the overseer refusing to pay the pauper, the rector threatened him with legal proceedings, upon which the salary was paid, and the vestry afterwards increased it. Pauper executed the office, and received the emoluments, residing in *B.*, for several years: Held, that he was well appointed, and gained a settlement in *B.* *Rex v. Bobbing*, 682.

VII. Appeal.

1. Notice of appeal under local act, by whom to be given.

By a local act it was provided that,
if

if any person should think himself aggrieved by certain assessments, he might appeal to the quarter sessions, first giving notice, and entering into recognisance to prosecute such appeal. By another act, giving power to certain road-trustees, it was enacted, that they might sue and be sued in the name of any one or more of them; that no action or prosecution so commenced should abate by the death, &c., of such trustee; and that such trustee, in whose name any action or suit should be commenced or prosecuted in pursuance of the act, should be reimbursed his costs thereby incurred, and also the costs of prosecuting any indictment or other proceedings whatsoever, commenced or prosecuted against any person by order of the trustees.

A single trustee gave notice of appeal against a rate, beginning, "I, A. B., one of the trustees, &c., for and on behalf of myself and the others of the said trustees, hereby give you notice, that an appeal will be entered and prosecuted, *on behalf of the said trustees*, against a certain rate," &c. He also entered into a recognisance (in which no other trustee joined,) with the condition, "that *the said A. B., or the trustees* appointed under a certain act, &c., do appear at the next general quarter sessions, &c., and prosecute an appeal, &c., and abide the order," &c. It did not appear whether A. B. was or was not authorised by the trustees to take these steps, but they had made no disclaimer.

Held, that there was a sufficient notice and recognisance within the first-mentioned statute; and a mandamus issued commanding the sessions to hear the appeal. *Rex v. Justices of Surrey*, 701.(n).

2. What sufficient notice of grounds of appeal.

The parish of G. gave notice to the parish of P. of an appeal against an order removing H. and his wife, and children of the wife by a former husband, being under the age of sixteen, from P. to G., stating, as the ground of appeal, that H. was not settled in G. (setting out objections to this settlement), and that the children were settled in P., not stating what the nature of their settlement was. Held, Vol. V.

that this was sufficient notice, as to the children, under stat. 4 & 5 W. 4. c. 76. s. 81.

And, the sessions having refused to receive evidence as to the settlement of the children, distinct from that of the husband, on the ground of insufficiency of notice, this Court issued a mandamus commanding them to enter continuances and hear the appeal. *Rex v. Justices of Cornwall*, 134.

3. How far party confined to terms of his notice.

(1.) Of grounds of removal.

The parish officers of K., intending to remove a pauper to C., sent to the officers of the latter parish a notice of chargeability, the order of removal, and the pauper's examination. The examination stated that the pauper was born at K., where his father then resided; but that the father then, and until his death, belonged to C., as the pauper had heard and believed; and that the pauper heard him say that he was a certificated man from C. The officers of C. gave notice of appeal on the ground that the pauper's father never was settled in or certificated from C. On the hearing of the appeal, the respondents offered evidence that the pauper's father was settled in C. by apprenticeship.

Held that, under stat. 4 & 5 W. 4. c. 76. s. 79., it was not necessary that more specific information should have been given of the grounds of removal, to render the above evidence admissible. *Rex v. Kelvedon*, 687.

(2.) Of grounds of appeal.

A pauper being removed to a parish as settled there by hiring and service, the parish gave notice of appeal, stating, as the ground (pursuant to stat. 4 & 5 W. 4. c. 76. s. 81.), that the pauper, at his hiring, stipulated to have two days' holidays at *Spalding* club feast in *July*; and that he had such holidays during his year of service. On the hearing of the appeal, the pauper (called for the respondents) proved on cross-examination that he, at his hiring, bargained for one day's holiday to go to *Tolbeach* fair, and had it during the year; but that he did not bargain for, or have, any holiday at *Spalding* club feast. The sessions having found an exceptive hiring, subject

ject to the opinion of this Court, whether evidence as to the one day's holiday was admissible,

Held, that, under the notice given, such evidence could not be received; and the order founded upon it was quashed. *Res v. Holbeach*, 685.

4. Service of notice on churchwardens, when parish divided into districts. *Statute*, XIII.

VIII. Order of filiation.

To what sessions application to be made. *Bastardy*, I.

IX. Overseers.

1. What they may include in their accounts. *Overseers*.
2. When Court will compel them to produce indentures before trial of appeal to be stamped. *Mandamus*, II. 7.

PRACTICE.

I. Amendment of record. *Post*, XI.

II. Arrest.

1. On bad affidavit to hold to bail. *Arrest*, III.
2. On ca. sa. without warrant. *Arrest*, II.

III. Bail.

1. Affidavit to hold to bail.
 - (1.) What it must state. *Arrest*, III.
 - (2.) How bad affidavit to be taken advantage of. *Arrest*, III.
2. To sheriff, when exonerated. *Bail*, III.
3. To action, when they may render. *Bail*, III.
4. Scire facias against. *Scire Facias*, I. 1.

IV. Certiorari.

1. Steps previous to application for, by parish. *Certiorari*, I. 1.
2. What must be shewn on application for. *Certiorari*, II.

V. Criminal information.

Upon what affidavits granted. *Information*, Criminal, I.

VI. Judge.

Form of motion to Court after hearing by Judge at chambers. *Arrest*, III.

VII. Judgment.

Entry of, after special finding by jury. *Post*, XI. 3.; *Statute*, XXXI. 2. (1.); *Verdict*, I.

VIII. Notice to produce.

What sufficient time of service. *Evidence*, VI. 2.

IX. Payment into Court.

When Court will compel. *Payment into Court*, I.

X. Production of papers.

When Court will compel, before trial. *Mandamus*, II. 7.

XI. Record.

Amendment of.

1. By inserting other parties.

A married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single. Having paid rent to A., of whom she took the premises, under a threat of distress, she was distrained upon by B., claiming to be the landlord, for the same rent. She brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A Judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his pleas and avow, in which case the plaintiff's coverture should not be set up:

Held, that such an order could not be made without the defendant's consent, though in a case of obvious oppression. Order set aside. *Eubank v. Owen*, 298.

2. By inserting new pleadings.

A cause was referred at Nisi Prius, and a verdict taken for the plaintiff, subject to a reference. The arbitrator certified to the Court, pending the reference, that it would be agreeable to the justice of the case to allow the plaintiff to amend his replication, by substituting de injuriâ, or some other replication which should put in issue all the allegations in the plea.

Held, that such amendment could not be ordered without consent of both parties. *Cross v. Metcalfe*, 800.

3. By making pleadings conformable to finding of jury.

In an action of replevin, commenced after stat. 3 & 4 W. 4. c. 42. came into operation, but in which the declaration was dated before the first day of Easter term

term 1834, the defendant avowed for rent arrear on a demise at an annual rent of 650*l*. Plea, non tenuit. The plaintiff gave evidence that the rent was only 500*l*.; and the defendant, before verdict, refused to amend. The jury found for the plaintiff; and found specially that the rent was 500*l*.; and this verdict was indorsed on the record.

Held, first, that the plaintiff must have judgment.

Secondly, that this Court would not amend the avowry, by making it conformable to the holding at 500*l*., and give judgment on the record so amended.

Thirdly, that the defendant was not entitled to a new trial, in order that he might have an opportunity of amending the avowry as above.

Fourthly, that the Court would not have granted a new trial under these circumstances, even if the declaration had not been dated before the first day of *Easter* term 1834; the defendant's proper remedy, if any, for the mistake in the avowry, being to apply to the Judge at Nisi Prius for leave to amend.

The Court refused to take the summing up of a Judge at Nisi Prius from a short-hand writer's notes. *Serjeant v. Chafy*, 354.

XII. Rule of Court.

Second application for rule on new statement of facts.

Where a rule had been obtained to discharge a party out of custody, and had been afterwards discharged, the Court refused to entertain the same question on a subsequent application, founded upon facts which had occurred before the previous rule was obtained; it not appearing that the party applying was then ignorant of the facts, though they were not then brought before the Court. *Bodfield v. Padmore*, 785. (n.)

See also *Information, Criminal*, I.

XIII. Trial, new.

To amend pleadings conformably to finding of jury. *Antè*, XI. 3.

XIV. Verdict.

Power of Judge to discharge jury from giving verdict. *Custom*, III.

PRESUMPTION.

See *Evidence*, IX.

PRIVILEGED COMMUNICATION.

I. What is. *Slander*.

II. How to be pleaded. *Libel*.

PROFIT A PRENDRE.

I. Distinction between profit à prendre and easement. *Easement*, I.

II. How right to be set out on pleadings. *Easement*, I.

PROHIBITION.

To Ecclesiastical Court.

When it lies.

1. The consistory court of *Hereford*, upon articles exhibited against a beneficed clerk, pronounced sentence, declaring that the said articles were for the most part sufficiently and fully proved, and suspended him for three years. After sentence, a rule for a prohibition was obtained, on the suggestion that some of the articles contained charges cognisable in courts of common law; but it was not denied that others were of ecclesiastical cognisance:

Held that, after this sentence, it must be presumed that the Ecclesiastical Court had proceeded upon such matters as were within its cognisance; and the rule was discharged. *Hart v. Marsh*, 591.

2. An executor having exhibited an inventory in the Ecclesiastical Court, at the instance of legatees, the latter filed exceptions to the inventory, and the executor put in his answer. The Court examined witnesses *vivâ voce* as to the correctness of the inventory, and afterwards decreed that the inventory was false and fraudulent, and ordered it to be amended according to the Judge's minutes. This Court, on motion by the executor, granted a prohibition:

Although the parties had consented to the examination being taken *vivâ voce*, and the executor had, after such examination, applied for leave to amend the inventory. *Griffiths v. Anthony*, 623.

PROMISSORY NOTE.

See *Bills of Exchange and Promissory Notes*

QUO WARRANTO.

When it lies.

1. For office of sexton. *Mandamus*, I. 5.
2. To member of corporation on grounds affecting whole corporate body.

The Court will grant a quo warranto information, at the instance of a private relator, against a member of a corporation, on grounds affecting his individual title, although it be suggested that the same objections apply to the title of every member, and therefore that the application is, in effect, against the whole corporate body. *Rex v. White*, 613.

RATE.

I. Church rate.

Power of churchwardens to borrow money on credit of rates.

1. Under statute 59 G. 3. c. 134. s. 14., churchwardens cannot raise a loan on the credit of the church rates to pay a debt for repairs, incurred in a past year.

The loan ought to be raised at the time when the repairs are done, and the laying of rates for the repayment should commence immediately, and be continued so as to pay off the debt by ten annual instalments. *Rex v. Churchwardens of Dursley*, 10.

2. See *Mandamus*, I. 2.

II. Poor rate.

1. Who liable to. *Poor*, I. 1.
2. Inspection of rate books. *Poor*, I. 2.
3. Appeal against poor rate. *Poor*, VII. 1.

RECOGNISANCES.

- I. Who to enter into, for parish, on application for certiorari. *Certiorari*, I. 1.
- II. Allowance of certiorari on insufficient recognisances. *Certiorari*, I. 1.
- III. Power of justices to commit to prison on neglect to enter into recognisances. *Conviction*, I.

RECORD.

- I. Amendment of. *Practice*, XI.
- II. Indorsement of special finding by jury under stat. 3 & 4 W. 4. c. 42. s. 24. *Statute*, XXXI. 2. (1.).

REFUSAL.

- I. What amounts to a demand and refusal. *Mandamus*, I. 5.
- II. By commissioners under local act to entertain complaint, how far an order, determination, and judgment. *Statute*, XLI.

REFLEVIN.

- I. Detention how far a taking.
 Replevin for taking and detaining, &c. *Avowry* for rent arrear. *Plea*, that, after the taking and before the impounding, plaintiff tendered the rent and expenses.
 On special demurrer, for that the plea did not go to the taking but only to the detaining, held a good plea, the tortious detention being a taking. *Evans v. Elliott*, 142.
- II. Amendment of *avowry* after special finding by jury. *Practice*, XI.

RULE OF COURT.

- I. Second application for rule on new statement of facts known on first application. *Information*, *Criminal*, I.; *Practice*, XII.
- II. *Hil.* 4 W. 4.
 1. What may be given in evidence on plea of non-assumpsit. *Bailment*, II.
 2. Proof of certificate by apothecary, when dispensed with. *Evidence*, XI.
- III. *Mic.* 7 W. 4.
 Rules upon sheriffs, 519.

SCIRE FACIAS.

- I. Against bail.
 1. When it may be sued out.
A. obtained judgment against *H.* of *Michaelmas* term, and sued out a ca. sa., which was returned, non est inventus, on 13th *January*. On 14th *January*, *H.* obtained a rule nisi for a new trial or nonsuit, and that proceedings should be

be stayed in the meanwhile; and he had given notice to *A.* of his intention to move for this rule, before the ca. sa. was sued out. The rule was discharged on 8th *June*. On 9th *June* a sci. fa. against the bail was sued out: Held to be regular; and that no fresh entry of judgment, or alias ca. sa. was necessary.

Three of the days during which the sci. fa. lay at the office of the sheriff (of *Middlesex*) before the return, were *Whit Monday, Tuesday, and Wednesday*. It appeared by affidavit that these days were half-holidays at the office, the hours of general business being only from eleven to two; but that the sci. fa. book might be searched for the same time as on other days. Held, that these three days were to be counted as searching days.

The sci. fa. was returned nil, on 15th *June*. *R.*, one of the bail, had left the place where he formerly resided (in *Lancashire*), and which was described as his residence in the recognisance, and had quitted the realm. *A.*'s attorney knew that he had left his residence, but did not know whether he was gone. On 9th *July* a letter was sent by post to *R.*'s former residence, giving him notice of the proceedings, which was not returned from the Dead Letter office. On 23d *July* *A.* obtained a Judge's order for signing judgment against the bail, which was signed accordingly, *R.* not having been summoned. The Court refused to set the judgment aside.

Held that, if *R.* had shewn any matter which, had he been summoned, he might have pleaded in bar to the sci. fa., he might have been allowed, on motion, to plead (though not to render), if the matters were not denied; or, if they were denied, he might have had *audita querela*. *Armitage v. Rigbye*, 76.

2. Lying for inspection before sheriff's return. *Antè*, 1.
 3. What notice to bail requisite. *Antè*, 1.
 4. How insufficiency of notice to bail may be taken advantage of. *Antè*, 1.
- II. To revive judgment.
- Whether pending writ of error may be pleaded. *Error, Writ of*, I.

SCOTLAND.

Law of, to be proved as set out on pleadings. *Pleading*, V. 2.

SEISIN.

In allotments under local inclosure act, from what time it takes effect by commissioners' award. *Inclosure*.

SESSIONS.

Court of quarter.

1. Jurisdiction of, to award compensation under local act. *Statute*, XLI.
2. How far Court of K. B. concluded by inference of facts drawn by sessions. *Poor*, III., 1.
3. What Court of K. B. will presume to support decision of sessions. *Poor*, III., 1.

SEXTON.

- I. Right of election to office, how to be determined. *Mandamus*, I. 5.
- II. Whether quo warranto lies for the office. *Mandamus*, I. 5.

SHORT-HAND WRITER.

Notes of, for what purpose receivable by court. *Practice*, XI., 3.

SLANDER.

Privileged communication.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. *Martin v. Strong*, 535.

See also *Libel*.

ST. JAMES.

(*Westminster*.) Election of churchwardens, how to be made. *Statute*, III.

ST. MARTIN.

(*Westminster*.) Election of churchwardens, how to be made. *Statute*, III.

STAGE COACH.

Liability of proprietors of. See *Bailment*.

STAMP.

I. On agreement ad valorem.

By the same agreement close A. was demised at a rent of 200*l.* a year, and close B. at the same rent which was paid by the tenant then in possession, not otherwise describing the amount. The agreement was produced in evidence, with an ad valorem stamp on the annual sum made up of 200*l.*, and of the rent paid by the abovementioned tenant, the amount of which was proved by witnesses.

Held, that the document was rightly stamped, and properly admitted in evidence. *Parry v. Deere*, 531.

II. On attornment, when necessary as for agreement. *Ejectment*, I.III. Whether Court will compel parties to produce documents before trial to be stamped. *Mandamus*, II., 7.

STATUTE.

FIRST: Decisions on public and general statutes.

I. 43 *Eliz.* c. 6. (Costs.) What constitutes an interest in land. *Costs*, I., 3.II. 29 *Car. 2.* c. 3. (Frauds.) Parol demise under s. 3. *Landlord and Tenant*, VI.III. 1 *Jac. 2.* c. 22. (Division of parish of *St. Martin, Westminster*.) Election of churchwardens, how to be made.

By statute, 1 *Jac. 2.* c. 22. (1685), the parish of *St. James, Westminster*, was created, by dividing a district from the parish of *St. Martin*; and it was enacted, that the inhabitants of *St. James's* "shall be from time to time subject to the laws and statutes now in force, or hereafter to be made for the choice of churchwardens," &c. "and such other like parish officers, and other parochial duties within the said parish, in like manner as the inhabitants of the said parish of *St. Martin's* are or might be subject and liable unto." *St. Martin's* had been governed by a select vestry; and provi-

sion was made for continuing such a vestry in *St. James's*.

Before 1685 the practice in *St. Martin's* on the election of the two churchwardens had been, that the vestry chose them by scoring certain prepared lists (the greatest number of scores carrying the election); but, by usage, the junior churchwarden of the preceding year was re-elected of course. It did not appear how or when this practice originated. The power of the select vestry to choose the churchwardens was often disputed in *St. Martin's* after 1685; and, for the last two years, the elections by them were discontinued, and the officers chosen according to stat. 58 *G. 3.* c. 69. No alteration was made in *St. James's*.

Held, that the mode of election practised in 1685 was one of the laws then in force, by which, under stat. 1 *Jac. 2.* c. 22., the parish of *St. James* was to be governed. And that the abandonment of the custom by *St. Martin's* did not oblige *St. James's* to discontinue it also.

St. James's had adopted Sir *John Hobhouse's* act. Agreed, that this made no difference. *Rex v. Churchwardens of St. James, Westminster*, 391.

IV. 11 *G. 1.* c. 18. (City of *London*.) Effect of, upon custom of city of *London* as to election of aldermen. *Custom*, III.V. 5 *G. 2.* c. 19. (Appeal to sessions and certiorari.) Recognisances on application for certiorari. *Certiorari*, I. 1.VI. 11 *G. 2.* c. 19. (Landlords and tenants.) Double costs under. *Costs*, I. 1. (2.)VII. 13 *G. 2.* c. 18. (Certiorari.) Notice previous to application for certiorari. *Certiorari*, I. 1.VIII. 17 *G. 2.* c. 3. (Poor rates.) Right of rate-payers to inspect books. *Poor*, I. 2.IX. 22 *G. 2.* c. 46. (Attorneys and solicitors.) What may be pleaded to action of debt for penalty. *Pleading*, IV. 6. (2.)X. 13 *G. 3.* c. 78. (Highways.)1. Order of justices for stopping and diverting highway. *Highway*, II. 1. (1.)

2. Cer-

2. Certiorari under s. 5. *Highway*, II.1. (1.)

XI. 17 G. 4. c. 56. (Woollen manufacture.) Conviction under : proceedings on appeal. *Conviction*, I.

XII. 35 G. 3. c. 73. (Parish of *St. Mary-le-Bone*.) Right of rate-payer to inspect rate books. *Poor*, I. 2.

XIII. 41 G. 3. c. 109. (Inclosure.) Notice by commissioner, upon whom to be served.

A parish was divided into four tithings, A., B., C., and D., A. containing the parish church. Each titling maintained its own poor, and each had a churchwarden, elected at a vestry of the parish in general, but from and by its own inhabitants. The minute of appointment included all the four, and stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them and each of them, "truly to execute the office of churchwarden within your parish." None ever acted out of his own titling, unless in signing the annual presentments to the archdeacon of the state of the church, &c. Each of the tithings (except A., which was exempt) raised its own church rate, and paid it to the vestry clerk; and he kept a separate account for each churchwarden, who accounted with the inhabitants of his own titling.

A commissioner of inclosure under a local act and the general act, 41 G. 3. c. 109. s. 3., made an order settling the boundaries between the above parish and another parish adjacent, and adjudging certain lands to be in the latter; and he, within a month, served a description of the boundaries on a party then acting as churchwarden of titling A. Until the order, the lands in question had been rated to titling B.

On appeal against a poor rate made upon the above lands as situate in titling B., notwithstanding the commissioner's order :

Held, that the description of boundaries had been sufficiently served according to the proviso of stat. 41 G. 3. c. 109. s. 3., requiring such a description to be served upon "one of the

churchwardens or overseers of the poor of the respective *parishes*."

Although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted.

Held, also, that the sessions had acted rightly in rejecting evidence offered to shew that the commissioner, in his inquiry into the boundaries, had not conducted his examination in the manner required by stat. 41 G. 3. c. 109. s. 3. *Rex v. Marsh*, 468.

XIV. 43 G. 3. c. 46. (F frivolous arrests.) When defendant entitled to costs under s. 3. *Costs*, I. 5.

XV. 48 G. 3. c. 123. (Imprisonment for small debts.) Discharge of prisoner on petition of wife. *Execution*.

XVI. 55 G. 3. c. 68. (Highways.) Order of justices for stopping and diverting highways. *Highway*, II. 1.

XVII. 55 G. 3. c. 192. (Devises of copyhold estates.) To what devises it extends. *Devise*, II.

XVIII. 55 G. 3. c. 194. (Apothecaries.) Proof of certificate, when necessary. *Evidence*, XI.

XIX. 56 G. 3. c. 139. (Parish apprentices.)

1. Jurisdiction of justices in allowing indenture. *Poor*, II. 1.
2. How far consent of justices necessary to existing service. *Poor*, II. 2.

XX. 58 G. 3. c. 69. (Parish vestries.) Plurality of votes under s. 3., to what parishes applicable. *Parish*, I. 1.

XXI. 59 G. 3. c. 134. (Church building.) Power of churchwardens to borrow money under s. 14. *Mandamus*, I. 2.; *Rate*, I. 1.

XXII. 3 G. 4. c. 126. (Turnpike roads.)

1. How far it controls local act as to rateability of tolls. *Poor*, I. 1. (3).
2. Certiorari how affected by 4 G. 4. c. 95. *Jury*, III. 1.

XXIII. 4 G. 4. c. 95. (Turnpike roads.)

1. Construction of ss. 39. and 43. as to notice previous to revoking commissioners' orders.

Sect. 43. of the general turnpike act, 4 G. 4. c. 95., empowering commissioners of turnpike roads to remove their

their clerks, &c., must be taken in conjunction with sect. 39., which requires certain notices to be given when it is intended to revoke any order of the commissioners.

And, therefore, where commissioners had discharged a clerk by a resolution made without such notices, a mandamus was granted to restore him. Although, at a former meeting, the commissioners had ordered proper notices to be given of a meeting for the purpose of such discharge, and the notice had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself. *Re v. Trustees of Wrexham and Denbigh Roads*, 581.

2. In what cases certiorari within ss. 86 and 87. *Jury*, III. 1.

XXIV. 6 G. 4. c. 57. (Settlement of poor.) What constitutes a separate and distinct dwelling-house. *Poor*, V.

XXV. 7 G. 4. c. 57. (Insolvent debtors.) What assignment void under ss. 30. and 32. *Insolvent*, I.

XXVI. 11 G. 4. & 1 W. 4. c. 68. (Stage coaches.)

1. What is a receiving house within s. 1. *Bailment*, II.

2. What notices to be given by coach proprietors. *Bailment*, II.

XXVII. 11 G. 4. & 1 W. 4. c. 70. (Administration of justice.) Effect of, on admission of attorney. *Attorney*, I.

XXVIII. 1 W. 4. c. 21. (Prohibition and mandamus.) Costs under s. 6. *Post*, XLI.

XXIX. 1 & 2 W. 4. c. 60. (Regulation of vestries.) Right of rate-payers to inspect rate books. *Poor*, I. 2.

XXX. 3 & 4 W. 4. c. 27. (Limitation of actions.) What constitutes adverse possession under s. 15. *Ejectment*, II.

XXXI. 3 & 4 W. 4. c. 42. (Amendment of the law.)

1. Revocation of submission to arbitration. *Award*, II.

2. Indorsement of special finding on record.

(1.) Declaration against sheriff for an escape. Pleas, Not Guilty, and that defendant did not arrest. Issues thereon. At the trial, the plaintiff's evidence shewed that the plaintiff had

not arrested, but had negligently omitted to do so. The Judge would not amend the record, under stat. 3 & 4 W. 4. c. 42. s. 23., but allowed the case of negligent omission to be proved. The jury found the fact of omission specially, and assessed the damages at 30*l*.; and a verdict was entered for the defendant on both issues, and the special finding indorsed on the record, under sect. 24.

Held that this Court might give judgment for the plaintiff according to the right of the case, the variance being immaterial and the defendant not prejudiced.

Quære, whether the Judge, in acting upon sect. 24., might impose terms on the party availing himself of the statute. But, he not having imposed them, this Court declined doing so.

The *postea* stated the finding as to the sheriff's default, and the assessment of damages, and that, it appearing to the Court that, according to the very right, &c., plaintiff ought to have judgment to recover his damages (not mentioning costs), therefore, &c.

The Court, on a subsequent application by plaintiff, ordered the Master to tax plaintiff his general costs of the cause, but to allow defendant his costs of the issues; and that each party should pay his own costs of the motion to enter judgment according to the right. *Guest v. Elwes*, 118.

(2.) See *Practice*, XI. 3.

XXXII. 3 & 4 W. 4. c. 63. (Indentures of apprenticeship.) Jurisdiction of justices in binding parish apprentices. *Poor*, II. 1.

XXXIII. 4 & 5 W. 4. c. 76. (Poor.)

1. Sec. 72. To what sessions application for order of filiation to be made. *Bastardy*, I.

2. Sec. 79. What sufficient notice under. *Poor*, VII. 3. (1.)

3. Sec. 81. What to be stated in notice of appeal. *Poor*, VII. 2.

XXXIV. 5 & 6 W. 4. c. 50. (Highways.) Requisites of order of justices for stopping and diverting highways. *Highway*, II. 1.

XXXV. 5 & 6 W. 4. c. 76. (Municipal Corporations.)

1. Power of Court to restore name to burgess

burgess list. *Corporation, Municipal, I.*

2. How far bankrupt disqualified from holding office. *Corporation, Municipal, III.*

3. Funds for charitable purposes.

Semble, that, if property be granted to a corporation, subject to a payment for charitable purposes imposed by the grantor, this falls under the provisions of sect. 71. of stat. 5 & 6 W. 4. c. 76.; and that sect. 68. applies, not to such property, but to cases where the payment has been by the gift of the corporation itself. *Rex v. Sankey, 425.* (See remainder of placitum, *Attorney, III.*)

XXXVI. 7 W. 4. & 1 V. c. 78. (Municipal Corporations.) Power of Court to restore name to burgess list. *Corporation, Municipal, I.*

SECONDLY: Decisions on local acts.

XXXVII. *Paddington* parish regulation Act. Election of parish officers. *Parish, I. 1.*

XXXVIII. *Great Dover Street Road.*

1. Rateability of tolls. *Poor, I. 1. (3.)*

2. Notice of appeal. *Poor, I. 1. (3.)*

XXXIX. Inclosure act.

1. At what time legal seisin in allotments takes effect under commissioners' award. *Inclosure.*

2. Liability to poor rate of parson's corn rent in lieu of tithes. *Poor, I. 1. (2.)*

XL. *London Dock Company*: compensation for injury to property.

The *London Dock Company* were empowered by statute to make a new entrance to their docks, and to purchase houses, lands, &c.; and a jury was to assess (in case of disagreement) the purchase-money to be paid for houses, &c., and the compensation to be made for good-will, improvements, or for any injury to be sustained by any person interested in houses so purchased. By subsequent sections they were empowered to take down all houses, &c., to be purchased by them under the act, to level the ground, and to stop up all ways on the lands to be purchased (with one exception); to stop or turn any highway interfering with their works, with consent of two justices, &c.; and to provide such

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sluices, bridges, roads, &c., communicating with the docks and works, as they should from time to time judge necessary. It was then enacted that, if any person having an estate or interest not less than a tenancy from year to year in any houses, lands, &c., should be injured in his said estate or interest, by the making of any such cut, sluice, bridge, road, or other work, such person should be compensated by the company for such injury, the compensation to be assessed by a jury in case of disagreement.

The company, acting under the statute, pulled down a number of houses, and made a cut which intercepted several thoroughfares, and obliged those who had formerly used them to take circuitous routes. The tenants of a neighbouring public-house demanded compensation for injury to their estate and interest, inasmuch as the pulling down of premises and the obstruction of access had diminished the resort of persons to the house; and also, as the occupiers of the house were cut off from thoroughfares to the house formerly used; and thereby the value of the premises to sell or let as a public house or shop, but not as a private residence, was lessened.

Held, that the claimants were not entitled to compensation. *Rex v. London Dock Company, 163.*

XLI. *Thames and Isis* navigation: compensation.

By acts relating to a river navigation, commissioners were authorised to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream; and to make such horse towing-paths as they should think convenient for the navigation. If any person should think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction as they should think reasonable.

3 Q

And,

And, if the party complaining should be dissatisfied with such order, &c., he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents and purposes whatever.

A mandamus recited that *B.* was seised in fee of an ancient towing-path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, dispense with the use of the horses, and withhold the tolls; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from *B.*'s towing-path, and rendered the towing-path, and his exclusive right, wholly unprofitable; that so *B.* was aggrieved, &c.; that he had complained to the commissioners and demanded compensation adequate to the injury which he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination, and judgment that they could not accede to *B.*'s application; that *B.*, being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay *B.* 1000*l.* in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay; and the writ commanded them to pay.

Return, That the commissioners, believing *B.* had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to *B.* that they refused to accede to his application; that *B.* treating this refusal as an order, &c., appealed; that, on the appeal, the commissioners objected that the refusal was not an order, but the quarter sessions over-ruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that *B.* was no further entitled to the path than as owner of the land; that they had not obstructed his towing-path, nor placed any obstacle to the

navigation against the towing-path; that parties might, and sometimes did, still navigate by the old channel. Held,

(1.) That the refusal of the commissioners was an order, determination, and judgment, from which an appeal lay to the sessions.

(2.) That the sessions had jurisdiction to award compensation to *B.*, both for the damage suffered by his towing-path being less used, and for the obstruction of the old navigation.

(3.) That the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the return (assuming it to negative the obstruction of the navigation) did not deny that the sessions had found such obstruction.

(4.) A peremptory mandamus was awarded to the commissioners to pay the money.

(5.) But the Court would not give the prosecutor costs of the mandamus, under stat. 1 *W. 4. c. 21. s. 6.*, considering the question to have been very doubtful. *Rex v. Commissioners of Thames and Isis*, 804.

XLII. *Harwich* paying act.

Liability of clerk to commissioners for their negligence. *Pleading*, II. 1.

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I. Removal of officers by commissioners under stat. 4 G. 4. c. 95. *Statute*, XXIII. 1.

II. Tolls under local act, whether rateable to poor rate. *Poor*, I. 1. (3).

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What variance between record and facts proved will entitle plaintiff to judgment under stat. 3 & 4 W. 4. c. 42. s. 24. *Statute*, XXXI. 2. (1).

See also *Pleading*, X.

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I. How verdict to be entered after special finding by jury.

The Judge at Nisi Prius having told the jury that, in case of their believing a particular fact, the verdict must be for the plaintiff, the jury retired, and the Judge and counsel on both sides quitted the Court, leaving the associate. The jury returned into Court, and told the associate that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so: but the jury expressed to him their dissent, and said that they were not agreed to find for the plaintiff.

The Court discharged a rule nisi, obtained on affidavit of these facts, for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff. *Doe dem. Lewis v. Baster*, 129.

II. Special finding under stat. 3 & 4 W. 4. c. 42. s. 24., its effect on judgment and costs. *Statute*, XXXI. 2. (1).

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WRITING.

WRITING.

- I. How far agreement in writing under Statute of Frauds may be waived by parol. *Frauds, Statute of*, I. 1.
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